UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 5

DISTRICT HOSPITAL PARTNERS, L.P. D/B/A GEORGE WASHINGTON UNIVERSITY HOSPITAL, A LIMITED PARTNERSHIP, AND UHS OF D.C., INC., GENERAL PARTNER,	)	
and	)	CASE NOS. 05-CA-216482
	)	05-CA-230128
1199 SERVICE EMPLOYEES INTERNATIONAL UNION, UNITED HEALTHCARE WORKERS EAST, MD/DC REGION A/W SERVICE EMPLOYEES INTERNATIONAL UNION.	)	05-CA-238809

RESPONDENTS' BRIEF IN SUPPORT OF EXCEPTIONS TO THE ALJ'S SEPTEMBER 4, 2019 DECISION

Submitted by:

FORDHARRISON LLP
Tammie L. Rattray
Florida Bar No.: 0128619
trattray@fordharrison.com
101 E. Kennedy Blvd., Suite 900
Tampa, FL 33602
Telephone: (813) 261-7800
Facsimile: (813) 261-7899

Paul R. Beshears
Georgia Bar No.: 055742
pbeshears@fordharrison.com
271 17th St. N.W., Suite 1900
Atlanta, GA 30363
Telephone: (404) 888-3800
Facsimile: (404) 888-386

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **PAGE(S)**

I. STATEMENT OF THE CASE

Respondent is an acute care hospital in Washington D.C.–The George Washington University Hospital ("the Hospital" or "GWUH"), and UHS of D.C. ("UHS") is the general partner. 1199 Service Employees International Union ("the Union") represented employees in the Environmental Services and Food Services (a/k/a "Dietary") departments at the Hospital.

This consolidated case involves allegations of surface bargaining (Case No. 216482) and an improper withdrawal of recognition (Case Nos. 230128, 238809). The case was tried before Administrative Law Judge ("ALJ") Michael A. Rosas on June 18-20, 2019. The ALJ issued his Decision on September 4, 2019 (JD-69-1)[1] making a number of findings adverse to Respondents, all of which are infirm. Specifically, the ALJ found that the Hospital violated Section 8(a)(5) and (1) of the National Labor Relations Act ("the Act") by (a) maintaining and adhering to bargaining proposals that provided the bargaining unit with fewer rights than if they had no agreement (specifically at issue, the dispute resolution procedure, a no-strike provision, and management rights), (b) engaging in regressive bargaining with respect to its proposal on discipline, (c) maintaining and adhering to bargaining proposals that deleted union security and gave the Hospital unfettered discretion with respect to wages, (d) unlawfully withdrawing recognition from the Union, and (e) refusing to bargain with the Union following that withdrawal. (JD at 43:40-44:16.)

In truth, however, the Union never tested the Hospital's willingness to bargain the purportedly unlawful proposals. Instead, they did not counter them, creating both the allegedly unlawful combination and "adherence" that the Hospital is accused of committing. When the

[1] The September 4, 2019 Decision of Administrative Law Judge Michael A. Rosas is cited as "(JD at [page number: line number])." The General Counsel's exhibits are designated as "(G.C. Ex. [exhibit number] at [page number])"; the Hospital's exhibits are designated as "(R. Ex. [exhibit number] at [page number])"; and the transcript is designated as: "(Tr. at [page number: line number].)"

Union failed to meet its statutory duty to bargain in good-faith, its membership circulated a decertification petition ("Petition"). The one fact that is undisputed in this case is that a majority of employees chose to disaffiliate from the Union.

II. QUESTIONS INVOLVED

- Whether the Hospital's **No Strike** and **Grievance and Mediation** proposals, alone or in combination, were lawful? (Exception Nos. 1, 2)

- Whether the Hospital's **Management Rights** Proposal, alone or in combination, was lawful or impermissibly broad? (Exception No. 3)

- Whether the Hospital's **Wage** proposal, alone or in combination was lawful or impermissible granted "unfettered discretion"? (Exception No. 4)

- Whether the ALJ improperly disregarded the Union's failure to test the Hospital's willingness to bargain the allegedly unlawful proposals? (Exception Nos. 5, 6)

- Whether the Hospital's **Union Security** proposal was lawful? (Exception No. 7)

- Whether the Hospital's **Discipline** proposal, alone or in combination, was lawful, and whether the Hospital's correction to it was regressive? (Exception Nos. 8, 9)

- Whether the Hospital's Bargaining Briefs were properly utilized by the ALJ to bolster his Section 8(a)(5) findings? (Exception No. 10)

- Whether the ALJ improperly applied *Lee Lumber* where there is no refusal to recognize and bargain with the Union? (Exception No. 11)

- Whether the ALJ properly analyzed the *Master Slack* factors in concluding the Hospital's alleged ULPs were causally related to the employees' disaffection? (Exception No. 12)

- Whether the Hospital properly withdrew recognition thereby extinguishing any subsequent duty to bargain with the Union? (Exception Nos. 13, 18)

- Whether the ALJ's credibility determinations and characterizations of the record were properly supported by testimony and other evidence, or if they should instead be overruled or accorded lesser weight? (Exception No. 14)

- Whether the General Counsel should have been permitted to amend the Amended Complaint to add an alleged *Johnny's Poultry* violation? (Exception No. 15)

- Whether there is record evidence to support the extraordinary remedy, which includes "minimum frequency" and negotiation costs components, ordered by the ALJ? (Exception Nos. 16, 17)

III. ARGUMENT

A. Facts Relevant to All Exceptions

The Hospital and the Union were parties to a CBA that expired on December 19, 2016. (G.C. Ex. 30.) The Parties engaged in negotiations for a successor agreement over 30 sessions that spanned a time period of 22 months, November 21, 2016-October 11, 2018. (R. Ex. 3, *passim*.) Steve Bernstein, an attorney, acted as lead negotiator for the Hospital (Tr. at 509:2-6, 537:22-538:10), joined by Jeanne Schmid, Staff Vice President of Labor Relations, and members of the Hospital's HR and management teams (R. Ex. 3, *passim*). Stephen Godoff, an attorney, represented the Union (Tr. at 28:23-29:1), joined by Union employees Lisa Wallace, Antoinette Turner and Yahnae Barner, and a few bargaining unit members (R. Ex. 3, *passim*). The Parties met in person, typically at the Hospital's offices on K Street, as follows (R. Ex. 3, *passim*):

1. November 21, 2016	11. February 23, 2017	21. January 17, 2018
2. November 22, 2016	12. March 28, 2017	22. February 13, 2018
3. December 6, 2016	13. March 29, 2017	23. May 18, 2018
4. December 7, 2016	14. April 5, 2017	24. May 21, 2018
5. December 21, 2016	15. April 6, 2017	25. July 31, 2018
6. December 22, 2016	16. May 16, 2017	26. August 1, 2018
7. January 17, 2017	17. June 12, 2017	27. September 5, 2018
8. January 31, 2017	18. July 12, 2017	28. September 6, 2018
9. February 1, 2017	19. July 31, 2017	29. October 10, 2018
10. February 22, 2017	20. October 6, 2017	30. October 11, 2018

During the very first session on November 21, 2016, Bernstein laid out the Hospital's guiding principles for the negotiations: "We want a contract that is clear [] to the managers that will utilize it." (R. Ex. 3 at 0006.) Schmid expounded, stating, "[A] lot of what we have is out of date and antiquated. We want to streamline and [make it] as modern as possible." (*Id.*) This is a sentiment and direction the Hospital would repeat often. (R. Ex. 3 at 0050, 0085, 0177; *see also* Tr. at 77:10-22 (Godoff agreeing that the expired CBA could use some updating).) A similar sentiment, expressed in virtually every session, was the Hospital's willingness to accept

counters, a sentiment that at times became a plea as the Union failed to provide written counters to many of the Hospital's proposals for months, if not years, on end. *See* Section E, fn. 12, *infra*.

The Union also had a talking point, taking the position, almost from the first session, that the Hospital did not want to get an agreement, and they positioned themselves to ensure an agreement did not happen over the 22 months of negotiations. For example, on December 7, 2016, Godoff's very first session, he gave introductory remarks that referred to the course of negotiations (which consisted of three sessions at that point) as "disturbing," and he questioned the Hospital's "intentions" and whether the Hospital really wanted to get a contract with the Union.[2] (R. Ex. 3 at 0045; *see also, e.g.*, R. Ex. 3 at 0177, 0181; Tr. at 124:12-14.)

The Hospital passed its final initial non-economic proposal on April 5, 2017. (R. Ex. 3 at 0188; *see also* R. Ex. 1 at 3617-3618.) This was five months into negotiations, and the Hospital had diligently, and with due seriousness in working toward a contract, passed an initial proposal or counter at every single session prior to that date.[3] (R. Exs. 1, 2 and 3, *passim*.)

As demonstrated in the bargaining notes and proposals, the Parties worked off similar drafts for each move and counter-move. (R. Exs. 1, 2, and 3 *passim*.) However, on September 5, 2018, the Union, via Godoff's colleague Brian Esders, presented a series of proposals that had

[2] During that same session, Godoff also referred to the Hospital's Human Resources Files proposal as "a nothing burger" and "an absolute waste of everyone's time." (R. Ex. 3 at 0049.) Two sessions later on December 22, in response to the Hospital's Layoff proposal, Godoff interrupted Bernstein's explanation of the proposal, stating, "Some things are so important [we] will wind up being at war. War with SEIU." (R. Ex. 3 at 0090.) At the next session, Godoff continued, calling the proposal "bullshit," "disgusting," "gratuitous bullshit and nastiness," "a disgrace," and stating "management flexibility my ass." (R. Ex. 3 at 0100-0101.)

[3] There were only four days that neither party passed a written proposal (May 16, July 12, and October 6, 2017 and February 13, 2018). (R. Exs. 1, 2 and 3, *passim*.) There were only two additional days where the Hospital did not pass a written proposal (April 6 and June 12, 2017) (*Id.*) In contrast, there were 11 additional days where the Union did not pass a written proposal (November 21 and 22 and December 22, 2016, January 17, February 23, March 29, and April 5, 2017, May 18 and 21, July 31, and September 6, 2018). (*Id.*)

clearly been photocopied from another contract and bore no resemblance to the proposals that had thus far been passed across the table. Those proposals concerned: Check-Off (R. Ex. 2 at 3811-3812), Grievance Procedure (R. Ex. 2 at 3813-15), Management Rights (R. Ex. 2 at 3816), Union Announcements & Conferences (R. Ex. 2 at 3817), and Union Security (R. Ex. 2 at 3818) (hereinafter, "League Proposals"). After some confusion where neither Esders, nor any of his committee, could (or would) explain the source or purpose of the radically different League Proposals (R. Ex. 3 at 0360-0362), Esders returned after a lunch break and explained that the proposals had been copied from a "league contract" that the Union had used with other employers. (R. Ex. 3 at 0363.) At the time, Esders admitted there was "going to be some work to tailor [the League Proposals] to GW." (*Id.*; *see also* Tr. at 158:15-17 (Barner admitting no modifications were made to the League Proposals to tailor them for GWUH).) As noted by Barner, the Hospital's committee was understandably "taken aback" and "had lots of questions" about the radical departure from the Parties' prior work. (Tr. at 140:23-141:6; *see also* Tr. at 109:20-110:4 (Godoff confirming Bernstein "rightly" viewed the League Proposals as divergent from "where we had been").)

At the time of the withdrawal of recognition, there was evidence of progress at the table. The Parties' five tentative agreements ("TAs") were all signed during three of the final four sessions in 2018: September 5 (Non-Discrimination (R. Ex. 1 at 3674-75) and Union-Management Conferences (R. Ex. 1 at 3680)), September 6 (Agreement (R. Ex. 1 at 3681), Job Postings & Filling of Vacancies (R. Ex. 1 at 3684-3685), and Uniforms (R. Ex. 1 at 3690)), and October 11 (HR Files (R. Ex. 1 at 3696)). Notably, absent undue delay, there is no explanation

for the Union's reluctance to sign the TAs earlier.[4]

B. The Hospital's No Strike and Grievance and Mediation Proposals, Alone or in Combination, were Lawful (Exception Nos. 1 and 2)

THE FACTS: The Hospital made its *initial* **No Strikes and No Lockouts ("No Strike")** proposal on March 29, 2017. After 15 months passed without any counter from the Union to the Hospital's *initial* **No Strike** proposal, the Hospital "bid against itself" and withdrew the proposal on June 7, 2018. (Tr. at 87:11-14, 119:20-120:10 (Godoff explaining the Union did not counter because it did not "perceive" the proposal "as serious" so "no response [was] necessary"); R. Ex. 1 at 3655-56.) Instead, the Hospital offered no restriction at all on the Union's right to engage in a work stoppage. (R. Ex. 3 at 0327 (Schmid clarifying that the Hospital's current position is that there would be no restrictions on work stoppages).) Therefore, as of June 7, 2018, this element of the allegedly illegal combination of proposals was no longer in place, having lingered as long as it did silently and solely due to intransigence by the Union.

The Hospital also made its *initial* proposal on **Grievance and Mediation** on March 29, 2017. When the Union finally did respond to the proposal 18 months later on September 5, 2018, they provided a League Proposal which did not bear any resemblance, at all, to the Hospital's initial proposal or the expired CBA.[5] At the time of the withdrawal of recognition, the Parties

[4] For example, on Non-Discrimination, the Union waited 18 months and 14 sessions to TA the Hospital's last counter that had been tendered on March 28, 2017. Similarly, the Hospital originally proposed eliminating the Union-Management Conferences article on April 5, 2017; the Union TA'd the Hospital's proposal 17 months and 12 sessions later. And finally, the Hospital proposed the Agreement article on December 7, 2016; the Union waited 21 months and 23 sessions before agreeing to TA the proposal. (R. Ex. 1 at 3681.)

[5] As just a few examples, when the Parties actually discussed the dueling dispute resolution proposals on September 6, the Hospital asked about having an informal step in the process, Godoff agreed "informal is when most grievances will be resolved," and Bernstein pointed out that the Union's proposal did not include that important step. (R. Ex. 3 at 0376.) When the Parties discussed the time period between steps in the grievance process, Godoff stated that "we define 'reasonable' as 10 days," to which Schmid pointed out, "but that's not what [the Union's counter] says in this proposal." (*Id.* at 0377-0378.) In a third discrepancy (and what serves as yet

had discussed the dispute resolution process on September 5 and 6 and October 10, 2018, each time the Hospital trying to understand the real purpose and meaning of the League proposal and expressing a willingness to negotiate. As of October 10, Godoff admitted that the League Proposal needed "modification" in order to work at the Hospital. (R. Ex. 3 at 402.)

THE LAW: There is no support in the record for the ALJ's conclusion that the Hospital "conceded" that it's **No Strike** proposal was unlawful. (JD at 36:4-7.) A no-strike clause is not illegal, and the ALJ's observation that the Hospital attempted to "tie-in" the **No Strike** and **Grievance and Mediation** proposals is also not illegal. It is not *per se* bad faith for an employer to seek a work stoppages provision while concurrently rejecting arbitration. *NLRB v. Cummer-Graham Co.,* 279 F.2d 757 (5th Cir. 1960) (it was not a refusal to bargain in good faith where employer refused to agree to arbitration clause but was adamant about securing a no strike clause), *denying enforcement of, in part,* 122 NLRB 1044 (1959); *see also Drake Bakeries v. American Bakery Confectionery Workers, Intl.,* 370 U.S. 254, 261 n. 7 (1962) (rejecting "flat and general rule that [no strike and arbitration] clauses are properly to be regarded as exact counterweights"); *Textile Workers Union v. Lincoln Mills of Ala.,* 353 U.S. 448 (1957).

The Hospital's *initial* proposal also had a meaningful dispute resolution process. The Hospital's proposed procedure offered independent mediation (to include a panel of mediators for selection) as a meaningful way to resolve disputes; this process was not available to non-bargaining unit employees. (Tr. at 90:25-91:7.) And while the Union may have taken issue with the Hospital's *initial* **Grievance and Mediation** proposal, the Hospital had not tendered its final dispute resolution proposal, and in fact, at least three times in 2018, including on the last two

---

another example of the Hospital's willingness to consider arbitration), Bernstein asked Godoff if the Union believed there should be limits to the arbitrator's authority, Godoff replied "yes," and Schmid pointed out that while such a limitation was in the expired CBA, it was another component notably absent from the Union's proposal. (*Id.* at 0380.)

days of negotiations, October 10 and 11, the Hospital's committee continued to make reference to the potential that the Parties could ultimately agree to arbitration.[6]

C. The Hospital's Management Rights Proposal, Alone or Combined, was Lawful (Exception No. 3)

THE FACTS: During the December 6, 2016 session, the Hospital provided the Union with its initial **Management Rights** proposal, and Bernstein explained the basis for it. (Tr. at 34:10-35:4; R. Ex. 1 at 3542-3543; R. Ex. 3 at 0043-0044.) As part of that explanation, Bernstein explained that because the Hospital was also proposing a "zipper clause," it believed the **Management Rights** article needed to be expanded. (R. Ex. 3 at 0044 ("Tried to be comprehensive. Capture things we're exercising. That's the spirit we are delivering this proposal."); *see also* Tr. at 92:19-23, 95:25-96:6.) The next day, the Union provided its verbal response to the Hospital's **Management Rights** proposal. In doing so, Godoff shared his views on the proposal, expressing specific objections to the subcontracting and security language contained therein. (R. Ex. 3 at 0054-0056.)

On February 1, 2017, the Union furnished the Hospital with its first written counterproposal in show changes mode, based upon an electronic version of the Hospital's initial proposal. (R. Ex. 2 at 3761-3763; *see also* R. Ex. 3 at 0129-0130.) Specifically, Godoff conveyed the Union's desire to retain language within Article 30.3 of the expired CBA, which provided that the Hospital, in exercising its management functions, may subcontract any bargaining unit work only so long as it meets certain parameters (including it does not result in layoff). Godoff proceeded to address Subsections a-z of the Hospital's initial proposal, stating that the Union

[6] *See, e.g.,* Tr. at 88:25-89:6 (Godoff confirming Hospital discussed potential reinstatement of the **No Strike** proposal if the Parties ultimately agreed to arbitration); R. Ex. 3 at 0327 (while explaining the withdrawal of the **No Strike** proposal, Schmid explaining it "could change **if we go back to arbitration**"), 0380 (Bernstein inquiring as to whether there should be limits placed on the "arbitrator's authority"), 0411 (Hospital proposing mediation "as of today").

agreed and/or had no objection to Subsections a, b, c, d, f, g, h, j, k, n, o, p, q, r, u, v, y or z. (R. Ex. 3 at 0129-0130; *see also* Tr. at 103:6-105:4.)

On March 28, the Hospital tendered a written counterproposal, and again, Bernstein explained the basis for the Hospital's counter which had accepted one change proposed by the Union. (Tr. at 50:20-24; R. Ex. 3 at 0165-0170, 3593-3594; R. Ex. 1 at 3593.) After receiving the Hospital's counter, Godoff told the Hospital's committee "to get the fuck out of here." (R. Ex. 3 at 0168.) Regardless of Godoff's disappointment with the Hospital's counter, the fact remains that by that point in time, March 2017, the only items in the **Management Rights** proposal on which the parties had yet to agree were the Union's proposed subcontracting language, along with Hospital proposals set forth in Subsections e, i, 1, m, w, and x. (R. Ex. 1 at 3593-3594.)

The Union failed to counter the Hospital's **Management Rights** counter for 18 months, until September 5, 2018 when it provided a League Proposal. On the face of the League Proposal, it was clear that (a) it did not contain any of the concessions (or related provisions) that had appeared with the Union's prior counterproposal tendered back on February 1, 2017, (b) it directly contradicted the Union's February 1 counterproposal to the extent it now contained language imposing an outright restriction on all subcontracting, (c) it withdrew no less than twenty specific waivers to which it had previously agreed, and (d) it deleted the following language: "Any of the rights, powers and authority the Hospital had prior to entering this Agreement are retained by the Hospital." (*Cf.* R. Ex. 2 at 0129-0130 and 3816.)

During the afternoon session on September 5, Bernstein conveyed to Esders that the Union's most recent **Management Rights** counterproposal differed substantially from its counterpart in the expired agreement, and from its own previous counterproposal on the same issue. (R. Ex. 3 at 0360.) Godoff returned to the table on September 6, and Bernstein told Godoff

that he did not see any attempt in the Union's latest proposal to take the Hospital's prior proposal (or the Union's counter to that proposal) into account. (R. Ex. 3 at 0386.) In response, Godoff recommitted to the League Proposal as the Union's counter. (*Id.*) It was at this point, in the face of the Union's regressive position, that Bernstein re-proposed the Hospital's prior March 28, 2017 counterproposal. (*Id.*; R. Ex. 1 at 3676-3677.)

THE LAW: The Board holds that the withdrawal of a proposal that had previously been agreed upon will be considered unlawful and designed to frustrate the bargaining process unless good cause is shown for the withdrawal. *Transit Service Corp.*, 312 NLRB 477, 483 (1993); *see also White Cap, Inc.*, 325 NLRB 1166, 1169 (1998). The Union failed to provide any believable rationale for withdrawing from its agreement to substantially all of the provisions of a **Management Rights** article initially proposed by the Hospital in December 2016. The only explanation for the League Proposal offered by the Union to date is that was "a shot in the dark" and/or intended to "keep the ball rolling." (Tr. at 108:4-21, 139:25-140:15.) The Union's conduct is clearly regressive under Board law. *See, e.g., International Union of Journeymen & Allied Trades, Local 124 (Galaxy Towers)*, Case 22-CB-010448 (June 11, 2008) (union engaged in unlawful regressive bargaining, rejecting the union's defense that it never entered into an agreement to permit subcontracting).

Further, it is unclear if the ALJ took issue with the Hospital's **Management Rights** proposal itself, or if the purported violation existed only when viewed in combination with other proposals. (*Cf.* JD at 15:17-23 (with **Discipline);** 36:12-17 (with **Wages**).) Clearly, a broad management rights proposal is not unlawful or evidence of bad faith. *St. George Warehouse, Inc.*, 341 NLRB 904, 907 (2004), *enf'd* 420 F.3d 294 (3d Cir. 2005); *Coastal Electric Cooperative*, 311 NLRB 1126, 1127 (1993). The combination of the Hospital's proposals is

discussed more fully below in Section D.

In *Kitsap v. Tenant Support Services, Inc.,* cited by the ALJ, the employer's initial broad management rights proposal was rejected by the union, and the employer's second management rights proposal actually *added* two additional rights reserved for management. 366 NLRB No. 98 (2018), p. 4 and fn. 11. In its final proposal, the employer proposed that all of the enumerated management rights would not be subject to the grievance and dispute resolution procedure. *Id.* at p. 9 and fn. 11, fn. 20. No such language exists in the Hospital's proposal, and in fact, the Hospital's proposal acknowledges that management rights "may be expressly abridged or limited by a specific provision of this Agreement." (R. Ex. 2 at 3542, 3593.) *See, e.g., Coastal Electric*, 311 NLRB at 1127 (broad management rights clause not evidence of bad-faith, especially where it was subject to restrictions as negotiated in balance of agreement). At the time negotiations ceased due to the withdrawal of recognition, terminations, for example, were subject to dispute resolution (R. Ex. 2 at 3693-3695), and the dispute resolution process had not reached impasse either.

In sum, while the Hospital stands accused of tendering an "overly broad" **Management Rights** proposal, the truth of the matter is that the Parties had reached written agreement on a large majority of the proposal. Ironically, it was the Union who then violated the Act by engaging in regressive bargaining with the submission of the September 5 League Proposal. Stated another way, for the "over nearly two years" cited by the ALJ, **the Union, not the Hospital, failed to negotiate Management Rights**.

D. The Hospital's Wage Proposal, Alone or in Combination, was Lawful (Exception No. 4)

THE FACTS: At the time the Union made its first **Wage** proposal on April 6, 2017 (R. Ex. 2 at 3780), the Parties had already been discussing an underpayment, and how to fix that

underpayment, in Dietary.[7] (Tr. at 500:16-502:7 (Wallace stating underpayment "germane" to, and not a separate issue from, the negotiations for the new agreement).) The Parties agreed that the cause of the error in Dietary pay was the confusing two-tier wage scales (paying EVS and Dietary differently) found at Exhibits 3 and 4 of the expired CBA. (Tr. at 62:12-63:15, 110:19-111:6; R. Ex. 3 at 0215; GC Ex. 30 at pp. 37-39.) In fact, Godoff "never disputed" that the pay system at the Hospital needed to be addressed, and admittedly, "encouraged management to come up with a fix." (Tr. at 111:3-112:8; *see also* Tr. at 582:9-17.)

When the Union made its initial **Wage** proposal on April 6, it did not attempt to address the issue that had led to the Dietary underpayment. (Tr. at 111:7-112:4; R. Ex. 2 at 3780; *see also* R. Ex. 3 at 0216.) Instead, the Union simply requested 5% across-the-board raises (*Id.*; *see also* Tr. at 54:7-17), essentially ignoring the problem. However, when Godoff presented the Union's proposal, he acknowledged that the current wage structure led to significant problems for the bargaining unit. (R. Ex. 3 at 0214-0216; Tr. at 111:3-112:8.) The Union added to their economic proposal on June 12, adding a proposal for preceptor pay and proposing language related to the Union's training fund. (R. Ex. 2 at 3788-3792.) The Parties further discussed **Wages** in October 2017. Following an extensive discussion about the Dietary underpayment, Bernstein asked the Union's committee whether the discussion might lead them to propose something more robust than a 5% ATB. (R. Ex. 3 at 0273.) Godoff again acknowledged the issues with the current structure, and described the current system (the same system the Union simply slapped 5% on top of) as "terribly unfair." (*Id.*)

Three sessions later, on Friday, May 18, 2018, the Hospital made its first **Wage** proposal.

[7] The Union agrees that the Hospital ultimately made the employees whole, with interest, despite the fact the entire recalculation process was frustrating to both parties. (Tr. at 63:16-65:22, 115:9-23.)

(R. Ex. 1 at 3641-3643.) The Hospital meticulously explained the proposal, including the merit and bonus components that were being proposed. (R. Ex. 3 at 0303; *see also* R. Ex. 3 305-311, 314-318.) The Hospital did not have the "Appendix B" (ranges and differentials) finalized for discussion that day, but committed to providing it to the Union at their next session, Monday, May 21, which they did.[8] (R. Ex. 3 at 0314; *see also* R. Ex. 1 at 3651-3654 (05/21 Appendix B).) Godoff admits there were portions of the Hospital's *initial* **Wage** proposal that he liked, finding the differentials to be "a positive step" and noting "no one was going to object to lump sum bonuses" as the Hospital had proposed. (Tr. at 112:16-24, 125:16-23; *see also* R. Ex. 3 at 315 (describing increase in all differentials as a "productive move").) **As admitted by the Union, both of these components of the Hospital's Wage proposal were non-discretionary.** (Tr. at 112:25-113:1.) The Union also agreed that it was favorable that "everybody was going to get a raise." (Tr. at 125:19-20.)

The Parties continued to discuss the proposal, with the Hospital's committee emphasizing that the years of experience ("YOE") criteria that they were proposing to use to place employees into various pay ranges, was objective. (R. Ex. 3 at 0303, 0328.) When Godoff asked where individual YOE would fall under the proposal, Bernstein candidly admitted that the YOE schedule was a process the Hospital had not yet completed. (R. Ex. 3 at 0317.) Godoff noted that, "[I]t may very well be that we don't have a complaint with it, but this is [a] complicated process …" (R. Ex. 3 at 0318.)

At the next session, July 31, the Parties again discussed the Hospital's **Wage** proposal, and by then, the Hospital had completed the process of aligning YOE with a wage rate within

[8] At the hearing, Godoff complained that the "problem" with the Hospital's May 18 Wage proposal was "there was no Appendix B." (Tr. at 66:3-11.) The complaint is disingenuous, as it is undisputed that the Hospital promised and provided the Union the Appendix at the next session which was the next business day.

each range. (R. Ex. 3 at 0328-0332.) The Union shared their unwillingness to negotiate the merit component of the proposal, with Brown stating, twice, that the Union "is not going to look to do" merit, and "merit is not anything the union is looking to do." (R. Ex. 3 at 0331-0332.) The next day, August 1, the Hospital presented an updated Appendix B that raised two of the ranges, and also provided the Union with a YOE chart. (R. Ex. 1 at 3666; R. Ex. 17.) That same day, Schmid verbally added to the Hospital's **Wage** proposal a floor; specifically, that every employee would get at least a 2% increase at the time of ratification and placement in the Hospital's proposed ranges. (Tr. at 113:24-114:5; R. Ex. 3 at 0351, 0412.) Also at this session, the Hospital provided the Union with the specific YOE information for all bargaining unit members. (R. Ex. 3 at 0351-3052 (Schmid reviewing how to read the spreadsheet, using Union committee member Bey, who was awarded 20.63 YOE, as an example, and Barner stating she understood the explanation[9]).) Bernstein expounded, noting that "we're willing to review anything the employee or you all present to us that suggests our [YOE] calculations are off." (R. Ex. 3 at 0352; *see also*, R. Ex. 3 at 0401-0402 (confirming the Hospital will review any YOE information); Tr. at 605:5-24.) The Hospital even arranged for the Union to have meetings in the Hospital's cafeteria with their members in order to review the YOE information. (Tr. at 605:10-22, R. Ex. 3 at 0395.).)

During the October 10, 2018 session, Godoff inexplicably asked, "how do the merit based increases work?", and Schmid had to remind him that she answered that question, in detail, when she presented the proposal on May 18. (R. Ex. 3 at 0395-0396.) After Schmid again

[9] Barner provided inaccurate testimony on this issue at the hearing when she testified that the Union never got any documents related to the **Wage** proposal and "never got answers" to its question about "what the range would look like." (Tr. at 133:5-134:2; *cf.* Tr. at 138:14-15 (Barner contradicting her earlier testimony and admitting she received YOE information).)

answered Godoff's first question,[10] he then asked, "Where are you placing the employees in the range?" Schmid had to remind him that the Hospital had already provided that information to the Union as well. (*Id.*[11]; *see also* R. Ex. 3 at 0351-3052; R. Ex. 17.)

There are no facts to support the claim that the Hospital "maintained and adhered" to an illegal Wage proposal that had never been countered and which addressed a serious pay problem that the Union acknowledged existed within the bargaining unit. At the hearing, Godoff claimed that the Hospital was "not bargaining" and the ranges were "not negotiable." (Tr. at 67:25-68:8.) He further claimed that the Hospital refused to consider the Union's verbal suggestion that an employee with a certain evaluation score receive a minimum merit increase. (Tr. at 69:13-70:4.) However, Godoff's testimony is belied by the contemporaneous bargaining notes. On May 21, the same day Godoff asked if the Hospital would negotiate the ranges, Schmid invited the Union to "counter." (R. Ex. 3 at 0310; *see also* R. Ex. 3 at 0311 (that same day, Bernstein stating "we will accept a counter"); R. Ex. 3 at 0332 (following discussion about the role of performance evaluations in the Hospital's proposal, Bernstein stating, "Okay, we have work to do on that side of it.").) At the time of the withdrawal, the Union had not made a counter to the Hospital's initial wage proposal. (Tr. at 114: 16-24; *see also* R. Ex. 3 at 0400.) The Union had possessed the Hospital's **Wage** proposal, to include ranges and differentials, since May, and data regarding

[10] The ALJ improperly implied that during this exchange, the Hospital's position was "unchanged." (JD at 28:20-21.) Of course it was, as the Union had yet to counter, instead asking the Hospital to repeat the exact same explanation of the proposal that it had already provided to the Union back in May.

[11] Schmid reminded Godoff more than once that she had already provided the Union information regarding the YOE assigned to each employee, and Bernstein attempted to refresh his recollection, referencing the Parties' prior discussion that the Union could use the cafeteria in order to review the YOE information with their membership. (R. Ex. 3 at 0395-96.) Godoff's responses were, "Maybe I didn't look at that, may be my fault" and "I wasn't appraised and wasn't there." (*Id.*) This is, of course, untrue, as the minutes clearly reflect that Godoff was in attendance at, and fully participative in, the August 1, 2018 session where the YOE chart and the individual YOE assignments were discussed in detail. (R. Ex. 3 at 0346-0354.)

YOE and employee YOE placements since August 1.

THE LAW: Initially, the Hospital's **Wage** proposal did not give it "unfettered discretion." Within the Hospital's *initial* **Wage** proposal, there were non-discretionary bonuses and non-discretionary differentials. There was also a minimum 2% raise for every employee in Year 1, and published ranges. *See, e.g., Audio Visual Services Group, Inc.*, 367 NLRB 103, p. 7 (2019) (even though employer's wage proposal reserved right to set wage rates, the proposal did not provide for "unbridled discretion" where the rates would have to fall within published ranges). In addition, the record establishes that the Hospital solicited the Union's input regarding the YOE assigned to their members, and even arranged for cafeteria access to allow for meetings between the Union and its membership. (R. Ex. 3 at 0352, 0395-0396, 0401-0402; Tr. at 137:25-139:7, 502:13-503:19.) And while there was indeed a merit component, it is not illegal for an employer to bargain for merit-based pay.

The ALJ cited to *McClatchy Newspapers*, 321 NLRB 1386, 1391 (1996), and *Woodland Clinic*, 331 NLRB 735, 740 (2000), for the proposition that a "proposal to give [an] employer unrestricted control over wages constituted bad faith bargaining" which is an incorrect reading of the cases. (JD at 36:20-22.) Those cases make clear that a merit wage increase proposal that confers broad discretionary powers on an employer is a mandatory subject of bargaining on which parties may lawfully bargain to impasse. For example, in *McClatchy*, the Board recognized a distinction between lawfully bargaining to impasse over such a proposal and unlawfully granting discretionary merit wage increases consistent with the proposal. The Board explained that the former is privileged by *NLRB v. American National Insurance*, 343 U.S. 395 (1952), in which the Court held that it was lawful for an employer to insist on the retention of discretion under a managements rights clause over certain mandatory subjects of bargaining. The

latter, the Board explained, is prohibited as an exception to the general rule that an employer may implement proposals at impasse, because to permit an employer to implement a proposal giving it unfettered discretion over mandatory subjects like wages would be destructive to the collective-bargaining process. Accordingly, under *McClatchy* and its progeny, merely proposing, even to impasse, a clause that gives unfettered discretion to the employer over wages is not unlawful bad faith bargaining. *See McClatchy*, 321 NLRB at 1391 ("Nothing in our decision precludes an employer from attempting to negotiate to agreement on retaining discretion over wage increases."); *Woodland*, 331 NLRB at 740 ("The pay-for-performance proposal here, which reserves substantial discretionary power to the Respondent, is similar to the merit pay increase proposal at issue in *McClatchy Newspapers*."); *Audio Visual Services Group, Inc.*, 367 NLRB at p. 6-7 (the respondent's offer of "status quo" merit based wage rates, from which it never retreated, was not evidence of bad faith).

As noted by the Board, "[I]n negotiations, initial wage proposals do not mean much." *Stone Container Corp.*, 1991 NLRB LEXIS 398, 19 (1991), *aff'd by* 313 NLRB 336 (1993). Here, the Hospital made an *initial* **Wage** proposal that had a merit component; the Union never countered it prior to the withdrawal. There is simply no 8(a)(5) violation based on these facts. *See, e.g., Audio Visual Services Group*, 367 NLRB 103, p. 7 (no violation of 8(a)(5) where employer made "opening offer" to retain discretion over wage increases during the term of the CBA and union never countered it).

E. The ALJ Failed to Address the Union's Failure to Test the Hospital's Willingness to Bargain its Proposals (Exception Nos. 5, 6)

THE FACTS: The Hospital made its initial **Grievance and Mediation** proposal on March 29, 2017 (R. Ex. 1 at 3601-3603); the Union countered (a League proposal) on September 5, 2018 – 18 months later (R. Ex. 2 at 3813-3815). The Hospital amended its **Discipline** proposal

to bring it in conformity with the **Grievance and Mediation** proposal (the alleged "regressive" proposal) on May 25, 2017. (R. Ex. 1 at 3627-3630.) The Hospital made its initial **No Strike** proposal on March 29, 2017 (R. Ex. 1 at 3610-3611); the Union never countered and the Hospital "bid against itself" and withdrew it on June 7, 2018 (R. Ex. 1 at 3655-58). The Hospital made its initial **Rights and Duties of Managers ("Management Rights")** proposal on December 6, 2017 (R. Ex. 1 at 3542-3543); after some back-and-forth and a counter by the Hospital on March 28 (R. Ex. 1 at 3593-3594), the Union countered (a League Proposal) on September 5, 2018 – 18 months later (R. Ex. 2 at 3816). The Hospital made its initial **Union Security** proposal on March 29, 2017; (R. Ex. 1 at 3614); after rejecting it without any substantive counter (R. Ex. 2 at 3771), the Union countered (a League proposal) on September 5, 2018 – 18 months later (R. Ex. 2 at 3818). The Union made its initial **Wage** proposal on April 6, 2018 (R. Ex. 2 at 3780-3782), amending it in June of that year (R. Ex. 2 at 3791-3792); the Hospital countered six sessions later on May 18 and 21, 2018 (R. Ex. 1 at 3641-3643, R. Ex. 1 at 3640), and at the time of withdrawal five months and six sessions later in October, the Union had not countered. The Hospital never stated that it was entrenched in a proposal or that it had presented its "last and final" offer as to any proposal. (Tr. at 128:8-14, 158:6-10.)

While refusing to negotiate or test the Hospital's willingness to bargain on these proposals, the Union filed Unfair Labor Practice charge 05-CA-216482 on March 12, 2018 (amended on September 7, 2018 and May 10 and June 2, 2019). The Region issued Complaint on September 25, 2018, and once the Union learned the Complaint would be forthcoming, it resumed negotiating and the League Proposals emerged on September 5, 2018. On all of the proposals, including the proposals at issue, the Hospital repeatedly asked the Union to counter,

and also, at each session, reminded the Union as the status of the pending proposals.[12] (R. Ex. 19 (Bernstein's contemporaneous status updates he gave to Union), *passim*.)

THE LAW: When reviewing allegations of bad-faith bargaining, the Board examines the totality of the employer's conduct. *Regency Service* Carts, 345 NLRB 671 (2005). The Board "may not, either directly or indirectly, compel concessions or otherwise sit in judgment upon the substantive terms of collective bargaining agreements." *NLRB v. American Nat'l Ins.*, 343 U.S. 395, 404 (1952). And the Board has cautioned that a finding of surface bargaining should not be based on a combination of proposals alone. *Coastal Electric Cooperative*, 311 NLRB at 1127 (rejecting ALJ's reliance "exclusively on the combination of certain of the proposals made by the [employer]"). Notwithstanding this directive, that is precisely what the ALJ did here.

There is no authority suggesting that certain proposals are in and of themselves *per se* indications of bad faith. The fact that proposals may be deemed disadvantageous to a party is not sufficient to justify such a finding. *Reichhold Chemicals (II)*, 288 NLRB 69, 69 (1988) (Board's examination of bargaining proposals will not involve decisions "that particular proposals are either 'acceptable' or 'unacceptable' to a party"); *see also Arkansas La. Gas Co.*, 154 NLRB 878, 60 (1965) (company-proposed changes in no-strike, management-rights, arbitration-and-grievance, and insurance-and-pension provisions not so onerous or unreasonable as to bespeak

[12] *See e.g.*, R. Ex. 3 at 0005 at ¶¶10-11 (11/21/16); 0016 at ¶¶1-2 (11/22/16); 0026 at ¶2 (11/22/16); 0050 at ¶¶7, 9, 0058 at ¶¶7-9 (12/7/1); 0067 at ¶18 to 0068 at ¶1, 0071 at ¶6 (12/21/16); 0085 at ¶7, 0088 at ¶¶2, 6, 0092 at ¶11 (12/22/16); 0100 at ¶¶14, 16, 0101 at ¶ 4, 0102 at ¶¶ 1, 13, 15, 0103 at ¶ 16 (1/17/17); 0126 at ¶10 (1/31/17); 0157 at ¶14 (2/23/17); 0165 at ¶6 (3/28/17); 0182 at ¶1 (4/5/17); 0186 at ¶¶16, 21 (4/5/17); 0201 at ¶¶2, 10 (4/5/17); 0202 at ¶10 (4/5/17); 0203 at ¶6 (4/5/17); 0206 at ¶6, 0209 at ¶8 (4/6/17); 0210 at ¶¶10-12 (4/6/17); 0220 at ¶¶6, 7 (5/16/17); 0220 at ¶8 (5/16/17); 0220 at ¶14 – 0221, ¶1 (5/16/17); 0310 at ¶5, 0311 at ¶1 (5/21/18); 0320 at ¶6 (5/21/18); 0322 at ¶¶8,10 (5/21/18); 0334 at ¶6 (7/31/18); 0336 at ¶¶14, 24, 0338 at ¶11, 0339 at ¶2, 0340 at ¶1 (7/31/18); 0349 at ¶¶4, 6, 0350 at ¶6 (8/1/18); 0360 at ¶1 (9/5/18); 0362 at ¶1 (9/5/18); 0371 at ¶17 (9/6/18); 0372 at ¶¶1, 5, 7 (9/6/18); 0383 at ¶6 (9/6/18); 0400 at ¶¶12, 14 (10/10/18).

bad faith). Instead, the Board measures whether the cumulative nature of the proposals nullifies the Union's ability to act as collective bargaining representative. *Reichhold Chemicals (II),* 288 NLRB at 84. The threshold in this regard is high, and includes proposals that require a union to cede its representational functions, or which grant the employer "unilateral control of over virtually all significant terms and conditions of employment of unit employees." *Regency Service Carts*, 345 NLRB at 675.

"Hard bargaining" is not a violation of 8(a)(5). *See, e.g.*, *Coastal Electric Cooperative*, 311 NLRB at 1127 (merely "hard bargaining" where the employer insisted on broad management rights, at-will employment, merit increases and no arbitration and union likewise insisted on just cause for disicpline and arbitraiton of disputes); *Formosa Plastics Corp.*, 320 NLRB 631 (1996) (no violation of 8(a)(5) where employer's "strategy was to obtain the contract it wanted by progressive concessions of its own after an initial tactic of shock bargaining"). Concessions are not required. *American National Insurance Co.* at 343 U.S. 404, 412 (1952); *see also I. Bahcall Steel & Pipe*, 287 N.L.R.B. 1257, 1261 (1988) (refusing to find violation of 8(a)(5) where the General Counsel's argument was based on allegation that the employer's original proposal (that was admittedly "sweeping and drastic" and "different in content and form" from existing CBA and that included "substantial[] reduc[tions] in most of the economic provisions) was defective, and therefore, the employer violated the Act by making it, as "to hold otherwise would be to indirectly compel a concession by finding that the original contract proposals could not be lawfully advanced"). Negotiating tactics are permissible. *NLRB v. Crockett-Bradley*, 598 F.2d 971, 976 (5th Cir. 1979) (rejecting finding of "bad faith" against employer for engaging in "negotiating tactic" (suggesting that employees reaffrm their desire to pay union dues every month), and pointing out that union engaged in similar "negotiating

tactics" (significantly above market wage proposal).)

While concessions will not be mandated, the Parties are required to meaningfully participate in the process. *Endo Labs., Inc.,* 239 N.L.R.B. 1074 (1978) (finding violation of 8(a)(5) and reviewing "presentation" of proposals versus their "substance" where one party presented a "take-it-or-leave-it" approach, rather than the "give-and-take" that "characterizes good-faith bargaining"). "In the realities of the bargaining process, neither party expects its first proposal to be accepted." *NLRB v. Fitzgerald Mills Corp.*, 313 F.2d 260, 265 (2nd Cir. 1963), *enforcing*, 133 NLRB 877 (1961), *cert. denied*, 375 U.S. 834 (1963); *see also* Tr. at 75:12-14 (Godoff "of course" agreeing that a party's first proposal is not necessarily its last). Further, simply because a proposal is "predictably unacceptable," it will not justify an inference of bad faith if the proposal does not foreclose future negotiations. *Fitzgerald Mills Corp.*, 313 F.2d at 271; *see also, Crockett-Bradley*, 598 F.2d at 975-77 (even though employer proposed broad management rights clause, no-strike clause, and zipper clause, finding of surface bargaining improper, especially where parties were still at the stage where they were making proposals, employer had attended bargaining sessions, and other articles, while not agreed, were "progressing"); *Gulf States Mfrs. v. NLRB*, 579 F.2d 1298 (5th Cir. 1978), *reh'g in banc denied*, 598 F.2d 896 (5th Cir. 1976).

In *Atlanta Hilton & Tower*, 217 NLRB 1600 (1984), the Board outlined conduct relevant to reviewing surface bargaining allegations, including, "delaying tactics, unreasonable bargaining demands, unilateral changes in mandatory subjects of bargaining, efforts to bypass the union, failure to designate an agent with sufficient bargaining authority, withdrawal of already agreed-upon provisions, and arbitrary scheduling of meetings." *Id.* at 1603. Here, the Hospital stands accused of only one of those indicia – allegedly unreasonable bargaining

demands. However, as discussed above, the Hospital's proposals were never absolute, and the Hospital was entitled to make them.

"The Board will not find that an employer failed to bargain in good faith if the union failed to test the empoyer's willingness to bargain." *Audio Visual Services Group, Inc.*, 367 NLRB 103, p. 6 (2019). Here, the Union admits that the Hospital never, not once, stated that it was entrenched in a proposal or that it had presented its "last and final" offer.[13] (Tr. at 128:8-14, 158:6-10.) In contrast, the Union was more resolute than the Hospital on certain issues, including union security, just cause for discipline, and arbitration, where the Union stated an outright refusal to consider any position other than their own. (*See, e.g., with respect to issues of "just cause" and arbitration,* R. Ex. 3 at 0108, 0147, 0203, 0260.) And more importantly, the Union refused to bargain any of the proposals that it did not like, thereby creating the "combination" and the "adherence" of which the Hospital is now accused.

Audio Visual Services Group is illustrative. There, the Board overruled an ALJ's finding that the employer engaged in surface bargaining where the employer's objected-to initial proposals included economics, discipline, dispute resolution and management rights. 367 NLRB at 7-8. In addition to rejecting the ALJ's findings as to the alleged unlawfulness of the proposals themselves, the Board observed that, like here, the union "did not sufficiently test the [employer's] willingness to bargain prior to filing its bad-faith bargaining charge," and specifically observed that "while the [employer] held firm to its initial proposals for wages, benefits, discipline, and grievance and arbitration, it did not display a general unwillingness to bargain over those subjects, and it did not suggest that its initial proposals for those subjects were

[13] Despite this admission, the ALJ stated that the Hospital "contend[ed]" that it never made a "last and final" offer. (JD at 35:42-45.) There was no "contention," as the Hospital proved and the Union admitted this fact. (Tr. at 128:8-14, 158:6-10.)

'take it or leave it.'" *Id.* at 8; *see also Captain's Table*, 289 NLRB 22, 24 (1988) (no violation where union failed to sufficiently test employer's willingness to enter into agreement, as the employer's first counterproposal on wages "was a starting point for future negotiations" and the employer "neither stated nor suggested by its conduct that it intended its first wage offer to be its last"). There, like here, the union complained about employer communications away from the table. The Board noted that even if the communications were not privileged under Section 8(c) (here, the ALJ found they were), they were not significant enough to support a finding of bad faith "where … the union failed to test the [employer's] willingness to reach an agreement at the bargaining table." 367 NLRB at pp. 8-9.

Here, the Hospital's proposals, both individually and collectively, do not violate Section 8(a)(5) of the Act. At most, they are indicative of hard bargaining. More accurately, they existed in combination due to the Union's failure to engage in productive negotiations about them. As stated by the Court in *NLRB v. Hi-Tech Cable,* and the Board in *Audio Visual Services Group*, a union may not sit idly and refuse to meaningfully participate in negotiations, no matter how distasteful it may find the employer's proposals. 128 F.3d 271, 278 (5th Cir. 1997); 367 NLRB at p. 8. Indeed, as demonstrated above, the only party who engaged in intransigent behavior was the Union. Regardless of (or despite) the content of the Hospital's (largely initial) proposals, the Union failed to negotiate with the Hospital about them. Rather than attempt to seek relief at the bargaining table, the Union allowed negotiations as the allegedly unlawful proposals to remain dormant while pursuing an unfair labor practice charge at the Board. Throughout this time period, the Hospital continued to meet with the Union in an effort to bargain a successor agreement, continued to timely respond to the Union's requests for information, and importantly, continued to remind the Union at virtually every session which proposals remained pending with

them and again and again requested counters so these important matters could be discussed, and ideally, resolved. On these facts, the proposals themselves "do not mean much," as they were untested by the Union, and the ALJ's finding of an 8(a)(5) and (1) violation must be reversed.

F. The Hospital's Union Security Proposal was Lawful (Exception No. 7)

THE FACTS: The Hospital passed its first **Union Security** proposal on March 29, 2017, proposing to remove **Union Security** from the contract. (R. Ex. 1 at 3614.) The proposal was not discussed during that session, as Godoff abruptly ended the session while telling the Hospital's committee to "get the hell out of the room" (Tr. at 126:12-17) and/or "kiss [his] ass" (R. Ex. 3 at 0180). During the April 5, 2017 session, Bernstein explained[14] that the Hospital had three reasons for making the proposal: (a) it had received complaints from current employees about the due obligation (**a fact SEIU representative Wallace confirmed** in stating, "it was only a few" (R. Ex. 3 at 0181)), (b) it acted as a hurdle in recruiting efforts, and (c) a philosophical opposition. (Tr. at 574:13-575:10; R. Ex. 3 at 0181-0182.) Bernstein then invited the Union "to propose [a] counter." (R. Ex. 3 at 0182.) During this same April 5 session, Godoff immediately pointed out that he was aware that the parent company has agreed to union security with the Union at another facility in Boston (Tr. at 83:23-84:11; R. Ex. 3 at 0182), demonstrating that the Union was well aware the Hospital was willing to negotiate their proposal (consistent with Bernstein's solicitation of a counter). In fact, Schmid emphasized this point, noting that the agreement in Boston was the "result of back and forth." (R. Ex. 3 at 0182.) However, rather than engaging in actual negotiations, Godoff provided the Union's response then and there: "We'll give you our answer now. No." (R. Ex. 3 at 0183), confirming that rejection with a counter in writing on April 6 (R. Ex. 2 at 3771 (stating, "REJECT")). *See also* Tr. at 575:11-19.

[14] The ALJ improperly found that Schmid made these remarks, but the bargaining notes and Bernstein's testimony belie this conclusion. (R. Ex. 3 at 0181-0182, Tr. at 574:13-575:10.)

The parties did not discuss **Union Security** again until 17 months later on September 5, 2018 when the Union passed a League Proposal on the topic. (Tr. at 83:4-8, 575:20-576:2; R. Ex. 2 at 3818.) While the League Proposal bore no semblance to the existing CBA (*cf.* R. Ex. 2 at 3818 and GC Ex. 30 at p. 3-4), the next day, it did prompt the first actual discussion on the issue since the Union's April 2017 outright and curt rejection of the Hospital's initial proposal. (Tr. at 602:10-603:6; *see also* R. Ex. 3 at 0361-0362, 0366.) Indeed, in substantive discussions on September 6, Bernstein was able to explain that the phrase "shall become" in the original CBA article was the Hospital's concern, and Godoff replied, "If that's your problem with it, we can certainly talk about it." (R. Ex. 3 at 0381-0382.) Following those discussions, it was Bernstein's understanding that the Union would tailor the League Proposal template into an actual counter for the Hospital's consideration. (Tr. at 573:22-574:12; *see also* R. Ex. 3 at 0382 (Godoff stating they will "clear [] up" non-applicable language and references in the League Proposal).)

THE LAW: The ALJ claimed that the Hospital unlawfully proposed elimination of union security on "philosophical grounds." (JD at 37:20-23.) However, it is undisputed that the Hospital provided three reasons why it wanted to eliminate the provision, only one of which was philosophical. (Tr. at 574:13-575:10; R. Ex. 3 at 0181-0182.) The ALJ then further made a legal error by implying that the Hospital had to "substantiate" the business justifications that it had provided. (JD at 37:23-25.) This is not the law, and it is also unnecessary when the Union agreed it was aware of at least "a few" employee complaints about dues. (R. Ex. 3 at 0181.) And this specifically is not the holding of the single case cited by the ALJ – *Kalthia Group Hotels, Inc.*, 366 NLRB No. 118 (2018). In *Kalthia*, the employer only provided one justification for its proposal to remove union security–a philosophical opposition–not three like the Hospital, here. 366 NLRB at p. 8.

The Board has long held that union security is a mandatory subject of bargaining. See *Duro Fittings Company*, 121 NLRB 377, 383 (1958). However, an employer's decision not to agree to union security does not violate the Act, nor does a "philosophical opposition" alone. *Phelps Dodge Specialty Copper Products Co.*, 337 NLRB 455 (2002) (affirming ALJ's decision that employer did not violate 8(a)(5) when it refused to agree to union security).

Contrary to the ALJ's finding, this is not a case where the employer failed to support its position on union security with anything but philosophical grounds, nor is it a case where the employer entered negotiations with a fixed intent not to agree to any form of union security or dues checkoff (which the Hospital had actually proposed (R. Ex. 1 at 3595-3597)). As admitted by the Union, the Hospital never presented its **Union Security** proposal as an absolute. (Tr. at 128:8-14.) *Cf. In re McLane Co.*, 166 N.L.R.B. 1036, 1042 (1967), *aff'd per curium*, 405 F.2d 483 (5th Cir. 1968) (finding of bad-faith where employer's representative told union negotiator he would never agree to union security) and *Duro Fittings Company*, 121 NLRB at 384 (finding of bad faith where the employer's representative declared at the outset of negotiations that the employer "would not enter into any agreement that contained a union shop agreement requiring membership in the union") with *McCulloch Corporation*, 132 NLRB 201, 211 (1961) (no 8(a)(5) violation where employer "never retreated" from initial position to grant union security but did discuss the issue).

Here, following the Union's refusal to discuss the Hospital's *initial* **Union Security** proposal as of April 2017, the issue sat stagnant until the Union finally re-addressed it in September 2018 (albeit with a League Proposal). At that time, the Parties' engaged in vigorous and productive discussions about the issue. The Hospital never said it would not consider union security, and in fact, was waiting for a tailored counter from the Union at the time of the

withdrawal of recognition. The ALJ's finding that the Hospital's fluid, non-final position on union security violated Section 8(a)(5) was simply wrong. *See, e.g.*, *A.M.F. Bowling Co.*, 314 NLRB 969, 974 (1994) and cases, *supra.*

G. The Hospital's Discipline Proposal was Lawful, and the Hospital's Correction to it was not Regressive (Exception Nos. 8 and 9)

THE FACTS: The Hospital passed its initial **Discipline** proposal on January 17, 2017. (R. Ex. 1 at 3561-3563.) At that time, the Hospital had not yet prepared, much less passed, a proposal on dispute resolution, and would not do so until March of 2018. (Tr. at 554:9-14; R. Ex. 1 at 3601-3603.) During discussion on January 17, the Parties reviewed the entire proposal, to include the Hospital's proposal that discipline short of termination could only be grieved, but termination would be subject to the full dispute resolution process, referencing "arbitration." (R. Ex. 1 at 3562; R. Ex. 3 at 0106-0108.) Godoff found there to be a "number of problems" with the Hospital's **Discipline** proposal, with the "biggest problem" being its failure to address "just cause." (Tr. at 40:3-9.)

Between January 17 and the date the Hospital made its first dispute resolution proposal on March 29, 2017 (**Grievance and Mediation**), the Parties exchanged counters on January 31 (R. Ex. 1 at 3567-3569; R. Ex. 2 at 3742-3745; *see also* R. Ex. 3 at 0137-0138), and discussed the proposals on February 22 and 23 and March 28 (R. Ex. 3 at 0147-0148, 0157-0158, 0171-0172). During this time period, Godoff admits that the Hospital addressed some of the issues the Union had raised and made "significant concessions" in its **Discipline** proposal, including, but not limited to, reducing the length of time a discipline would remain active in an employee's file. (Tr. at 45:7-21, 48:19-23, 81:18-22.)

The Hospital passed its *initial* **Grievance and Mediation** proposal on March 29, but it was not discussed until April 5, the same day the Hospital made its third proposal on **Discipline**.

In this third proposal, Godoff admits that the Hospital again moved on issues identified by the Union. (Tr. at 54:20-55:12; R. Ex. 1 at 3621-3623.) During the discussion, Godoff pointed out the one word discrepancy in the reference to "arbitration" within the **Discipline** proposal in light of the recently tendered **Grievance and Mediation** proposal, and Bernstein immediately acknowledged and verbally corrected the error.[15] (Tr. at 81:23-82:15, 554:22-556:18; R. Ex. 3 at 0187.) The Hospital's April 5 counter was updated via a May 25 e-mail from Bernstein to Godoff, in which he explained the proposals were revised "in an effort to reconcile some of the discrepancies that you pointed out." (Tr. at 556:19-558:14; R. Ex. 1 at 3627-3633 (emphasis added).) During the Parties' next session on July 12, Bernstein explained the revision was made to align the proposals. (R. Ex. 3 at 0244.) Subsequently, the Parties continued to negotiate the **Discipline** article, making progress up until the last bargaining session on October 11, with both the issues of "just cause" and "arbitration" remaining to be resolved. (Tr. at 118:10-16 (Godoff admitting there was additional movement by Hospital even after discrepancy raised and issues of "just cause" and dispute resolution remained).)

THE LAW: It is not inherently unlawful for an employer to propose and attempt to eliminate or severely limit the "just cause" standard of a collective bargaining agreement. *Public Service Co. of Oklahoma*, 334 NLRB 487 (2001) (holding that where the respondent's final proposal respecting "just cause" for discipline severely limited the traditional limitations to "just cause" in its earlier contracts, to the point that it essentially "gave the [r]espondent employment-at-will powers over employees," it was not sufficient evidence of bad faith); *Coastal Electric Cooperative, Inc.*, 311 NLRB at 1127 (holding that the respondent's refusal to change its position on employment-at-will and agree to any contractual limit in the Union's just cause

[15] Godoff raised the issue again during the May 16, 2017 session, but neither party prepared nor passed a proposal on discipline or dispute resolution during this session. (R. Ex. 3 at 0221.)

proposal, absent an insistence that the Union waive its right to strike, was not "inherently unlawful," but merely "indicative of hard bargaining"); *Latino Express*, No. CA-77678, 2013 BL 468997 (NLRB May 21, 2014) (holding that the employer's expansive definition of "just cause" was not "an indicia of bad faith," noting the absence of a demand that employees waive the right to strike, because "without such linkage, it is difficult to argue that the employee is left with fewer rights under the labor agreement than it would under law").

The aforementioned series of events is a far cry from the ALJ's finding that the Hospital admitted the early reference to "arbitration" "was in fact not a mistake." (JD at 11:fn. 19). In fact, at the citation provided by the ALJ, Bernstein simply read from the January 17, 2017 bargaining notes and acknowledged that the entire article, including the reference to "arbitration," had been reviewed that day. (Tr. at 597:5-599:8, Tr. at 608:5-609:17.) This does not change the undisputed fact that as of January 2017, neither party had proposed a dispute resolution process, and consistently since the date the Hospital did make its **Grievance and Mediation** proposal on March 29, 2018, the Hospital has been crystal clear that it intended to propose mediation, and the original reference in the **Discipline** proposal to "arbitration" was an error. Even the Union admits that the Hospital has treated the reference to "arbitration" in the January 2017 **Discipline** proposal as a mistake. (Tr. at 81:23-82:15.) And the same notes the ALJ relies upon to dispute that the Hospital made an error also clearly capture Bernstein immediately acknowledging the reference to "arbitration" in the **Discipline** proposal to be an error. (R. Ex. 3 at 0187 (Bernstein stating, "Error; replace with mediation procedure. Both sides have errors and both sides have corrected."[16]).)

[16] As an example of a Union "error," on September 5, 2018, the Union gave a "verbal counter" on the Safe Harbor article; that counter regressed from language that the Union had already accepted. (*Cf.* R. Ex. 2 at 3776 (04/17/2017 Union counter) with R. Ex. 3 at 0359, 0362-0363

In this case, the Hospital was not "regressive." The Hospital's modification was not intended to move backwards from a previously asserted position; it was intended to establish consistency within the Hospital's various proposals. (Tr. at 558:15-25.) Regardless, regressive proposals are neither unlawful *per se* nor necessarily indicative of surface bargaining. *See Optica Lee Borinquen, Inc.*, 307 NLRB 705, 721 (1992), *enforced*, 991 F.2d 786 (1st Cir. 1993). In gauging the employer's intent, the Board looks to its proffered justification. *Prentice-Hall, Inc.*, 306 NLRB 31 (1992) (good faith where employer had legitimate business reason for regressive proposals, which it fully explained to union).

Even if the May 25, 2017 **Discipline** proposal is considered "regressive," it was accompanied by a clear explanation for the change, and it was made prior to any Tentative Agreement. Notably, "[T]he Board has found it immaterial whether the union, the General Counsel, or the administrative law judge found the asserted reasons for making the regressive proposals totally persuasive. What is important is whether they are 'so illogical' as to warrant the conclusion that the Respondent by offering them demonstrated an intent to frustrate the bargaining process and thereby preclude the reaching of any agreement." *Oklahoma Fixture Co.*, 331 N.L.R.B. 1116, 1118 (2000) (internal citations omitted), *enforced*, 332 F.3d 1284 (10th Cir. 2003). Clearly, the Hospital's explanation was "logical," and critically, there was no agreement on the **Discipline** proposal at the time it was corrected; the Hospital did not regress from a tentative agreement, and there were multiple issues pending within the **Discipline** article (including Godoff's "biggest issue" of "just cause"), not just the forum for dispute resolution.

(Esders rejecting lines 17-20 "in full" and later confirming intent to reject lines 17-20 while acknowledging it had been accepted in Union's 04/17/2017 counter).) When Bernstein pointed out the regression, the Union explained it as follows: "If [the now deleted language] was included [in a prior proposal], it was in error," and claimed that since the Hospital had not accepted the Union's last proposal, it was entitled to revert from the previously proposed and accepted language. (R. Ex. 3 at 0362-0363).)

Oklahoma Fixture Co., 331 NLRB at 1119. The ALJ's finding that the Hospital violated Section 8(a)(5) and (1) when it revised its **Discipline** proposal to bring it into alignment with its recently introduced **Grievance & Mediation** proposal must be reversed.

H. The Bargaining Briefs Were Lawful Communications and the ALJ Inappropriately Relied Upon Them to Bolster his Faulty Surface Bargaining Conclusions (Exception No. 10)

While on the one hand properly recognizing that the Hospital Bargaining Briefs were non-coercive (JD at 38:23-31), the ALJ improperly concluded that they nonetheless "served to undercut unit employees' support for the Union." (JD at 38:12-14.) However, there is no record support for this conclusion. Throughout negotiations, the Hospital regularly communicated with its employees regarding the status of bargaining through "Bargaining Briefs". (*See* G.C. Ex. 3, 5, 8, 13, 16, 20, 22, 26, 27; *see also*, G.C. Ex. 36, 37, 38, 40, 43.[17]) The Bargaining Briefs were non-coercive, protected communications between the Hospital and its employees, and they should not be considered anything else. Importantly, the Board is "reluctant to find bad-faith bargaining exclusively on the basis of a party's misconduct away from the bargaining table." *Litton* Systems, 300 NLRB 324, 330 (1990), *enfd.*, 949 F.2d 249 (8th Cir. 1991), *cert denied,* 503 U.S. 985 (1992).

Section 8(c) of the Act "implements the First Amendment" such that "an employer's free speech right to communicate his views to his employees is firmly established and cannot be infringed by a union or the Board." *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969). As the Board has recognized, "permitting the fullest freedom of expression by each party" nurtures a "healthy and stable bargaining process." *Id.* It is not for the Board to "police or censor propaganda." *Linn v. United Plant Guard Workers of America*, 383 U.S. 53, 60 (1966); *see also*

[17] The Bargaining Briefs were the subject of two other unfair labor practice charges filed by the Union, Case Nos. 05-CA-190351 and 05-CA-194830. Both were withdrawn by the Union (February 17 and June 30, 2017, respectively).

Long Island College Hosp., 327 NLRB 944, 947 (1999). The only limitation for employers is that the expression cannot contain any "threat of reprisal or force or promise of benefit." Section 8(c). Thus, according to the Board, "an employer may criticize, disparage, or denigrate a union without running afoul of Section 8(a)(1), provided that its expression of opinion does not threaten employees or otherwise interfere with the Section 7 rights of employees." *Children's Center for Behavioral Development*, 347 NLRB 35, 35 (2006); *see also Optica Lee Borinquen, Inc.*, 307 NLRB at 708 ("Section 8(c) does not require fairness or accuracy, and does not seek to censor nastiness."). The Board has specifically held that Section 8(c) protects an employer's right to communicate facts and opinions about the union's conduct during collective-bargaining negotiations.[18] As such, the ALJ's effort to take the Hospital to task for "focus[ing] on the more raucous aspects" of a negotiating session and not "acknowledging concessions" by the Union is misplaced. (JD at 15:36-40.)

Here, the ALJ appeared to take particular umbrage with the Hospital's October 12, 2018 Bargaining Brief (G.C. Ex. 27), describing it as having "misrepresented" the Union's wage proposal and "impugning the Union for hampering the issuance of pay raises" which the ALJ found (without any record support) to have "triggered a stampede of disappointed unit

[18] *See, e.g., Children's Center*, 347 NLRB at 36 ("All that the General Counsel has proven here is that the Respondent expressed an unfavorable opinion about the Union, its positions, and its actions."); *NLRB v. Pratt & Whitney Air Craft Div., United Techs. Corp.*, 789 F.2d 121, 135 (2d Cir. 1986) ("None of the employer's communications to its employees were coercive. While strong language was used, stating that the union was on 'a collision course,' that their preparation was 'thoughtless and irresponsible,' and that their offers were 'unrealistic,' the employer never directly said—nor even implied—that the workers would be better off without the Union."); *United Technologies Corp.*, 274 NLRB 1069, 1074 (1985) (finding employer did not violate the Act by issuing "various bulletins to employees . . . essentially criticizing the Union's demands and tactics and setting forth its own version of the progress of negotiations"); *Procter & Gamble Mfg. Co.*, 160 NLRB 334, 340 (1966) ("The fact that an employer chooses to inform employees of the status of negotiations, or of proposals previously made to the Union, or of its version of a breakdown in negotiations will not alone establish a failure to bargain in good faith.").

employees to sign the petition." (JD at 38:10-21; 39:27-35; 41:4-8.) In fact, the Bargaining Brief accurately outlined the timeline of the Parties' proposals, and then made two specific comments about the Union's proposal: under it, (a) employees that made less than $20/hour (a majority in the unit[19]) would receive less than a $1.00 raise, and (b) employees would not receive any merit or bonus opportunity. (G.C. Ex. 27.) A review of the Union's proposal (R. Ex. 2 at 003780) demonstrates that these statements are indeed true.[20] The ALJ's findings about this Bargaining Brief is simply wild speculation crafted to bolster his other findings.

The cases cited by the ALJ are inapplicable. In *General Electric*, 150 NLRB 192, 195 (1964), the significant employee communications at issue communicated the employer's "fair and firm" offer at the bargaining table, implying that it would be futile for the union to attempt to negotiate, as the employer was only going to change its position if new information demonstrated it was no longer "right." Further, the Board clarified that its finding of a violation was based on the employer's "entire course of conduct," which in that instance also included "its failure to furnish relevant information, its attempts to deal separately with locals and to bypass the national bargaining representative, [and] the manner of its presentation of a particular proposal ("take it or leave it")," none of which are present here. *Id.* at 196. Both *Regency House of Wallingford, Inc.*, 356 NLRB 563 (2011), and *Miller Waste Mills, Inc.*, 334 NLRB 466 (2001), are direct dealing cases, a hallmark violation never alleged or found here. In *Regency House*, the employer was found guilty of granting an unlawful pay increase in a prior case and ordered to rescind the increase. The employer not only delayed in implementing the ordered rescission, but in a series of communications that were known to employees, the employer

[19] GC Ex. 30 at Exhibits 3 and 4 (wage scales, all below $20/hour).
[20] The Union proposed a 5% across the board increase – 5% of $20 is $1.00 – and there are no merit or bonus opportunities within the proposal. (*Id.*)

accused the union of "harming" and "casting stones" at the employees, creating what the Board found to be, in combination with the employer's refusal to institute the ordered remedy, "an implicit threat that employees' representation by the Union would be futile …." 356 NLRB at 567. In *Miller Waste Mills*, the employer first blamed the union for its failure to provide a regularly scheduled wage increase, and in subsequently granting that increase, communicated to employees directly that it did so because the employees, not the union, asked for the increase. 334 NLRB at 466-67. Clearly, the Bargaining Briefs were not unlawful, and there is no record support for the ALJ's improper use of them to bolster his 8(a)(5) findings.

I. ***Master Slack*, not *Lee Lumber*, Applies, and the Master Slack Factors Were Not Met (Exception Nos. 11 and 12)**

An employer cannot withdraw recognition "in a context of serious unremedied unfair labor practices tending to cause employees to become disaffected from the union." *Levitz Furniture Co.*, 333 NLRB 717, 717 fn. 1 (citing *Williams Enterprises*, 312 NLRB 937, 939-940 (1993), *enfd.*, 50 F.3d 1280 (4th Cir. 1995)). However, the Board has held, "[n]ot every unfair labor practice will taint evidence of a union's subsequent loss of majority support; in cases involving unfair labor practices other than a general refusal to recognize and bargain, there must be specific proof of a causal relationship between the unfair labor practice and the ensuing events indicating a loss of support." *Lee Lumber and Building Material Corp.*, 322 NLRB 175, 177 (1996), *affd. in part*, 117 F.3d 1454 (D.C. Cir. 1997).

The proper test to be applied based on the undisputed facts that emerged at the hearing is found in *Master Slack*, 271 NLRB 78 (1984). *Lee Lumber* does not apply. *Lee Lumber* involved a general refusal to *both* recognize and bargain with the incumbent union. Here, it is undisputed that the Hospital engaged in bargaining with the Union for a successor collective-bargaining agreement, during the period of November 21, 2016 through about October 12, 2018. The

Hospital withdrew recognition on October 26, 2018, two weeks after the most recent bargaining session and five days before the Parties' next scheduled session on October 31-November 1. (Tr. at 143:2-3.) At no point during this entire 22-month period did the Hospital generally refuse to recognize or bargain with the Union. There simply is no basis to contend that this case involves a general refusal to bargain, and *Lee Lumber* does not apply.[21]

In *Master Slack*, the Board identified the following factors as relevant in evaluating this causal relationship:

> (1) The length of time between the unfair labor practices and the withdrawal of recognition; (2) the nature of the illegal acts, including the possibility of their detrimental or lasting effect on employees; (3) any possible tendency to cause employee disaffection from the union; and (4) the effect of the unlawful conduct on employee morale, organizational activities, and membership in the union.

Id. at 84.

In this case, there are no unremedied unfair labor practices, let alone any that could have possibly tainted the Petition. At most, the General Counsel alleged and the ALJ found a violation of the Act premised entirely on bargaining proposals the Hospital previously had made to the Union. The Hospital has steadfastly denied the merits of these allegations. Even assuming *arguendo* that these allegations had merit, however, the alleged misconduct is both unproven and facially insufficient to taint the Petition under *Master Slack* and its progeny.

First, the length of time between when the unfair labor practices allegedly occurred and when the Petition was presented is far too remote to infer a causal connection. Specifically, the Hospital passed its **Grievance & Mediation**, **Management Rights**, **No Strike**, and **Union Security** proposals on March 28 and 29, 2017, a full year before the first signature appeared on

[21] Even if it did, however, *Lee Lumber* only adopted a presumption (and not a *per se* rule) which can be rebutted by establishing that employee disaffection arose *after* the employer resumed bargaining for a reasonable period without additional ULPs that would detrimentally affect bargaining. *Lee Lumber*, 322 NLRB at 177-78.

the Petition and 18 months prior to the time the Petition was presented to the Hospital. The Hospital withdrew **No Strike** in June 2018, and the Union did not counter any of the rest of the proposals until September 5, 2018, the month prior to the withdrawal. The Hospital's alleged "regressive bargaining" with its **Discipline** proposal began in March 2017 and was corrected by May 2017, 10 months before the first signature appeared on the Petition and 17 months before the withdrawal. The Hospital's *initial* **Wage** proposal was tendered in May 2018, and at the time of the withdrawal five months later in October, the Union had not countered it.[22] *See, e.g.*, *Champion*, 2007 NLRB LEXIS 331, 19 (2007) (violations occurring between 5 and 6 months before the withdrawal of recognition "too remote in time to have caused the employees' disaffection with the Union"); *Garden Ridge Management*, 347 NLRB 131, 134 (2006) ("[T]he 5-month period between the Respondent's last refusal to hold additional bargaining sessions and the time the petition was presented . . . weighs against finding that the unfair labor practice caused employee sentiment against the Union."). As discussed above, none of the proposals were unlawful, individually or in combination, especially when one considers the Union's refusal to test the Hospital's willingness to negotiate them.

The ALJ inconsistently claims the purported ULPs were "clearly connected," as supported by a "strong[] suggestion" created by the timing of the signatures. (*Cf.* JD. At 40:1-2 with 40:13.) However, when the employees chose to sign the Petition could be read any number of different ways, and quite frankly, there is insufficient record evidence to draw any type of sound conclusion beyond theory and hypothesis. For example, while the ALJ claims the timing of the last 30 signatures in October is

[22] The General Counsel's specious claim about the Hospital's **Wage** proposal first appeared in the Third Amended Charge filed on June 2, 2019 (16 days before the hearing).

"striking," two-thirds of the employees had already signed by August.[23] Further, because the Hospital's allegedly unlawful activity at the bargaining table is too remote to establish the required causal connection (as supported by the ALJ's own cases), the ALJ attempts to use the Hospital's October 12, 2018 Bargaining Brief to establish this required element. But the Bargaining Brief is not an independent (or any) violation of the Act (as recognized by the ALJ), and it is too attenuated to meet the requirement that a ULP be casually connected to the disaffection.

Second, the nature of the alleged violations simply does not support a finding of unlawful taint. In cases where the Board has found that an employer's unlawful conduct had the possibility of a detrimental or lasting effect on employees, the employer had typically committed hallmark violations of the Act, such as discharging union supporters (*see Goya Foods of Fla.*, 347 NLRB 1118, 1121-1122 (2006)); threatening employees with plant closure and job loss (*see JLL Rest., Inc.*, 347 NLRB 192, 193 (2006)); or making substantial unilateral changes like granting unprecedented wage increases (*see Overnite Transp. Co.*, 333 NLRB 1392, 1394 (2001)). No such evidence exists here, nor has a "hallmark violation" even been alleged (much less proven).

Third, the tendency of the Hospital's alleged violations was not to cause employee disaffection. In *Fruehauf*, for example, the Board found the employer's dilatory bargaining tactics, including not meeting for three months, not presenting contract proposals, and not offering substantive responses to union proposals, were of a nature that tends to have a lasting negative effect on employees. 335 NLRB 393, 394 (2001). Here, the Hospital

[23] The first signature appeared on the Petition in March 2018. By the time the Union finally countered the Hospital's March 2017 proposals on September 5, 2018 with the League Proposals, the Petition already had at least 49 valid signatures (approximately 60% of the total).

continued to meet with the Union and continued to pass proposals and counter-proposals until the last session before the withdrawal. At a minimum, when reviewing the Union's course of dealings during the same time frame, it is clear that the ALJ's conclusion that it was the Hospital's conduct, and not the Union's own intransigence, that led to employee disaffection fails to acknowledge the full course of bargaining, as well as the General Counsel's burden of proof. Notably, and as discussed more fully below in Section K, ten bargaining unit employee testified at the hearing in this matter. Each had a unique reason for signing the Petition; none of those reasons included the alleged bad-faith bargaining by the Hospital.[24]

Finally, there is no evidence that the Hospital's allegedly unlawful bargaining proposals had an effect on employee morale, organizational activities, or membership in the union. In addition to the employee testimony, above, the most telling evidence is that the parties continued to bargain throughout the entire time period, including 18 months after the allegedly unlawful combination of proposals was presented, five months after the Hospital's **Wage** proposal, and four months after **No Strike** was withdrawn. *See Quazite Corp.*, 323 NLRB 511, 512 (1997) (parties' continuation of bargaining after most violations occurred militated against finding that those violations caused later loss of majority support). Quite simply, even if the Hospital's bargaining proposals were made in bad faith (which they were not), there is absolutely no causal connection between those proposals and the employees' reported disaffection with the Union. The ALJ's contrary holding must be reversed.

J. The Withdrawal was Lawful and Supported by Objective Evidence, and as

[24] *See* Tr. at 280:15-25 (Barnes), 298:15-299:18 (Collins), 313:16-314:12, 322:10-25 (Claros), 332:25-333:15, 338:1-22 (Reyes), 346:1-10, 354:15-355:10, 356:24-357:11 (Otchere), 367:16-370:2 (Bellamy), 375:25-378:9, 384:18-387:5 (Cooper), 398:8-399:1 (Smith), 448:13-451:1 (Benti), and 467:9-468:5 (Ard).

Such, the Hospital did not have any Subsequent Obligation to Recognize and Bargain with the Union (Exception Nos. 13, 18)

THE FACTS: As noted by the ALJ, there is no challenge to the validity of the Petition or to the Hospital's conclusion that 81 of 156 eligible employees signed the disaffection petition. (JD at 31:30-31, fn. 85.) The ALJ failed to acknowledge, however, that the undisputed record evidence demonstrated that there were only 151, not 156, employees in the bargaining unit at that time, as five employees had terminated prior to October 25, 2018, but the Hospital's HR system had not yet been updated to reflect that fact. (Tr. at 626: 3-24; R. Ex. 8, 21, 22, 23.) As such, 53.6% of the bargaining unit signed the Petition.

THE LAW: It is well-established that an employer is not required to bargain with a union once it has withdrawn recognition. *See, e.g. Mkt. Place, Inc.*, 304 NLRB 995, 1003 (1991) ("In view of my findings concerning the Respondent's lawful withdrawal of recognition, I further find that there was no bargaining obligation…."). Here, the Hospital lawfully withdrew recognition on October 26, 2018. *See, e.g., Levitz Furniture Co. of the Pacific*, 333 NLRB 717 (2001). Therefore, the Hospital had no obligation to bargain with the Union over changes they announced *after* they lawfully withdrew recognition.

K. The ALJ's Credibility Determinations Were Contrary to the Record (Exception No. 14)

The Board will not overrule an Administrative Law Judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces the Board that the judge's credibility resolutions are incorrect. *Standard Dry Wall Products,* 91 NLRB 544 (1950), *enf'd.* 188 F.2d 362 (3rd Cir. 1951). However, the Board has cautioned that an Administrative Law Judge cannot simply ignore relevant testimony. *Permaneer Corp.*, 214 NLRB 367, 369 (1974). The Board has also noted that less weight is accorded to an Administrative Law Judge's credibility findings where the judge "omits reference to relevant testimony on critical matters

and mistakenly mischaracterizes the state of the record." *Bralco Metals, Inc.*, 227 NLRB 973, fn. 4 (1977).

Courts have also expressed concern about an Administrative Law Judge's discrediting of uncontradicted testimony. In *Medline Industries v. NLRB*, 593 F.2d 788, 795 (7th Cir. 1979), the Seventh Circuit reversed an Administrative Law Judge's credibility resolutions and quoted approvingly from the Eighth Circuit case of *Banner Biscuit Co. v. NLRB*, 356 F.2d 726 (8th Cir. 1966) that "a complete disregard for sworn testimony coupled with a tongue-in-cheek characterization of those utterances … depreciates the examiner's findings and obliges our close examination." *Id.* at 765. Significantly, the Board in *Starcraft Aerospace, Inc.*, 346 NLRB 1228, 1231 (2006), reversed credibility findings where the ALJ failed to acknowledge "uncontradicted testimony." *Id.* at 1231 (*citation omitted*).

The ALJ not once, but twice, made a patently incorrect factual finding related to Schmid, and compounded the error by then impugning her credibility based on that incorrect finding. (JD at 10:5-8; 31:6, fn. 82.) The ALJ attributed an e-mail (G.C. 36) to Schmid that references an unexplained "petition," and based his finding that she was "not credible" on that e-mail. G.C. 36 is a December 11, 2016 e-mail **from Alicia Brill** to six individuals --- **none of which are Schmid**. At the hearing, Schmid testified that she had never seen G.C. 36 (Tr. at 224:16-19), and it is clearly not **"her email,"** as stated by the ALJ. Schmid's testimony that she first heard about the Petition in "July, August, September" of 2018 (Tr. at 224:6-14, 227:813) is unrefuted in the record, and the ALJ's finding that she was "well aware of the petition by July 2018," based on an e-mail wrongly credited to her that she did not send and disavowed ever seeing at the hearing, is improper. This is the very definition of giving "complete disregard for sworn testimony."

The ALJ's bias remained on display when he discredited and/or misstated the testimony

of **every single employee witness that testified**.[25] Out of the gate, he summarily dismissed the testimony of Eugene Smith and Hardie Cooper, Petitioner and Co-Petitioner, as "not credible." (JD at 47: fn 60, 61.) He made the following improper characterizations of seven of the remaining eight employee witnesses[26]:

- **Angelica Claros:** The ALJ stated, "Claros' equivocation when asked to explain the circumstances when she signed the petition indicated that she felt pressure as a new employee to sign it …" (JD at 30, fn. 74.) However, Claros very clearly explained that she had been a member of another union (32BJ) at a prior job (ABN) for 15 years, and she felt that her prior union "didn't do nothing" so she did not want to join one at the Hospital. (Tr. at 313:19-314:12.) With respect to any "pressure," Claros testified: "He just say [sic] me, read this one. If you don't want it, you can sign the paper" (Tr. at 322: 10-16), and she confirmed when asked, "You didn't want a union anywhere?" that "Yeah, **I have my experience**." (Tr. at 322:23-323:2.) Claros further confirmed that the Petition was given to her, and she read all of it before signing. (Tr. at 323:5-13.)

- **William Barnes:** The ALJ stated, "Barnes did not credibly explain why he signed the petition after testifying that he [sic] no problem with the Union." (JD at 30, fn. 75.) Barnes testified that he "was a good worker, "so I felt like I didn't need no representative to, you know, represent me as far as my work…." (Tr. at 280:15-20.) He further explained, on cross, the voluntary nature of his signature, testifying that the Petition was on a table, he picked it up and read it, and then signed it because, "I don't really want to be represented by a union." (Tr. at 288:10-18.)

- **Tsedale Benti:** The ALJ claimed, "Benti ... conceded that she was primarily concerned with the fact that the raises had stopped as a result of bargaining." (JD at 30, fn 77). In reality, Benti **repeatedly** testified to her own personal displeasure with the Union because it did not provide her representation when she felt she needed it. She testified that she repeatedly called and texted the Union, and they never responded (Tr. at 448:13-449:11); she had a disciplinary meeting, and she could not get representation (Tr. at 449:12-24, 459:8-460:16); she called to ask them about educational assistance and they did not respond (Tr. at 449:25-450:16); and they did not help her stay on day shift (Tr. at 460:17-462:20). Her only testimony about money was on cross where she was asked, "Do you remember that the raises stopped and you did not get a raise in 2017?" (Tr. at 457:9-10), and she responded, "Yeah" and explained she understood the cessation was due to "meetings" between the Union and Hospital (presumably, bargaining sessions), but she did not want to hear about the meetings because "I don't need them." (Tr. at 457:12-458:1.) Benti never stated that she was "concerned" about her pay. (Tr. *passim*.)

[25] The General Counsel did not call a single bargaining unit member to testify. The Hospital called ten bargaining unit members – all of whom were hourly Environmental Services and Dietary employees being asked to testify about events that occurred six months to a year earlier.
[26] Lewis Bellamy is the only employee whose testimony the ALJ came close to properly characterizing. (JD at 31:1-2.)

- **Vivian Otchere:** The ALJ stated, "…[I]t was clear that her frustration was attributable to the Union [sic] inability to procure a pay raise." (JD at 30, fn 78.) Otchere, like Claros, had prior experience at another unionized employer (Mosaic). (Tr. at 346:11-20.) Unlike Claros, she found her prior union (285) to be very effective, and the Union paled in comparison. (Tr. at 345:18-346:10, 355:1-25.) The entirety of her testimony about a raise was in response to a question on cross, and she simply stated that she heard she might get a raise if she signed the Petition (Tr. at 360-17-19), but she never once said that was the reason she signed the Petition, and in fact, her testimony was that she signed because she found the Union ineffective in comparison to her prior union. She never, not once, said she was "frustrated" about money.

- **Noel Reyes:** The ALJ stated, "… [H]e felt that the Union did not do anything because he had not had a raise for two years." (JD at 30, fn 79.) In fact, Reyes testified that he had not wanted the Union since he started in 2003, and since 2003, the Union "never done anything for me." (Tr. at 333:6-15, 337:21-338:4.) His only testimony about money was in response to leading questions on cross. Godoff asked Reyes to confirm he did not get a raise during the two years since the contract had expired, which he did, and asked "And you concluded the Union hasn't done anything, right?", to which Reyes responded, "Yes." (Tr. at 342:7-9.)

- **Mary Collins:** The ALJ claimed Collins signed the Petition "because the Union was unable to get a contract and a wage increase." (JD at 31, fn. 81.) Collins testified that she attended about four bargaining sessions; others she wanted to attend, but they ended before she could get there. (Tr. at 298:23-299:2, 305:13-18.) When she did attend, she was unhappy that her representatives were "cursing,"[27] and when she asked the Union what was going on, they said they would get back to her but did not. (Tr. at 299:19-300:9.) Collins attended the bargaining session on October 12 and "wasn't really happy with what [she] saw," or with her discussion with a Union representative afterwards, and she signed the Petition the next day. (Tr. at 305:25-306:4.) In response to a leading question, Collins did confirm she was frustrated the Union had not been able to get a contract (Tr. at 310:15-311:1), but that was not the primary reason she offered for signing the Petition.

- **Freddie Ard:** The ALJ included Ard as an employee that was "disappointed" with the Union's inability to get a contract and wage increase. (JD at 30:14-16, fn. 76.) However, Ard actually testified that he had worked for the Hospital twice, from 1986-2001, and again starting in 2016. (Tr. at 468:2-4.) During his first tenure, he found the Union to be unresponsive, and when he returned, it was more of the same. (Tr. at 467:19-468:4, 475:15-25.) When directly asked (led) on cross examination, "I just wanted to be clear, your main concern was you were not getting a raise?", Ard very clearly rebuked the suggestion, "[M]y mail concern is that when I call on the Union, I look for a response." (Tr. at 477:21-24; *see also*, 478:23-479:15.)

  Here, the ALJ's characterizations of the employee testimony demonstrates his clear bias,

[27] Godoff admitted he freely cursed during the Parties' caucuses, although he never heard that type of language from Bernstein or Schmid. (Tr. at 80:18-81:4.)

as it improperly ignores sworn testimony on critical matters in favor of picking and choosing small snippets of information that support his narrative.[28] Because of this, the Board should afford the ALJ's characterization little to no weight. *Bralco Metals, Inc.*, 227 NLRB at 974.

L. The Amendment to Add a *Johnny's Poultry* Violation Should Not Have Been Permitted (Exception No. 15)

During the hearing, the General Counsel moved to amend the Complaint to allege the Hospital violated Section 8(a)(1) of the Act when, during its trial preparation, it interviewed employees without first advising them of their rights under *Johnnie's Poultry Co.,* 146 NLRB 770 (1964). The Hospital objected to the amendment on the basis that the filed-charge requirement of Section 10(b) of the Act had not been met. (JD at 42:6-13.)

Section 10(b) of the Act provides, contains the "whenever it is charged" proviso of Section 10(b) "'sets down a condition for the Board's exercise of jurisdiction,' namely, that the Board … may investigate and prosecute conduct only in response to the filing of a 'charge' …." *Precision Concrete v. NLRB*, 334 F.3d 88, 90 (D.C. Cir. 2003), *quoting Ross Stores, Inc. v. NLRB*, 235 F.3d 669, 677 (D.C. Cir. 2001). The exact allegations of the complaint need not be set out word for word in a prior-filed charge in order for the Board to exercise jurisdiction; nonetheless, there must be a "significant factual affiliation" between the allegations in a charge that has been filed and the allegations in the complaint. *G. W. Galloway Co. v. NLRB*, 856 F.2d 275, 280 (D. C. Cir. 1988).

Here, the ALJ acknowledged the Hospital raised a Section 10(b) argument against allowing the amendment because the allegations were not closely related to any of the charges filed against the Hospital (JD at 42:15-21), but he failed to address that argument. Instead, he

[28] The ALJ's bias was also apparent in his review of select portions of the Bargaining Notes, as he improperly characterized them as proving Bernstein "ignored" comments, "insist[ed]" proposals were urgent, "stymied" the Union from presenting economics, "plowed ahead" in discussions, and "deflected" certain issues. (JD at 13:5-8, 14:25-26, 15:31-34, 17:28, 19:34-35.)

attributed to the Hospital an argument that it never raised, rejected that argument, and then contended he has the authority to allow any amendment that he deems just. The ALJ claimed the Hospital argued the amendment to the Complaint "is barred as untimely pursuant to Section 10(b) …." However, the Hospital never argued, or even suggested, in its post-hearing brief, during the hearing, or at any other time that the amendment was untimely. Thus, the Hospital did not, as the ALJ glibly claimed, "overlook" when the alleged *Johnnie's Poultry* violation occurred. (JD at 42:23-37.)

Next, the ALJ contended he has the authority pursuant to Section 102.17 of the Board's Rules and Regulations to allow complaint amendments "upon such terms as may be deemed just …." (JD at 42:27-29.) However, neither the ALJ nor the Board's Rules and Regulations may manufacture jurisdiction that has not been granted to the agency by statute - even if the ALJ deems it just. Section 10(b) limits the jurisdiction of the Board, including its ALJs, to "investigat[ing] and prosecut[ing] conduct only in response to the filing of a 'charge' …." *Precision Concrete v. NLRB*, 334 F.3d at 90. As no charge was filed, there was no jurisdiction to consider the claim, and the ALJ should have rejected the amendment. *See, Folsom Ready Mix, Inc.*, 338 NLRB 1172 n. 1 (2003). Moreover, the Hospital was prejudiced by the claim as the General Counsel sought to assert it only after the Hospital began presenting its defenses.

Finally, the ALJ claimed the amendment was proper because it was similar to an amendment the Board allowed in *Pincus Elevator & Electric Co.*, 308 NLRB 684 (1992), *enfd. mem*. 998 F.2d 1004 (3rd Cir. 1993). While the Board in that case allowed an amendment based on an issue that arose at the hearing before the ALJ, the Board failed to consider whether it lacked jurisdiction under Section 10(b) because no charge had been filed. Thus, *Pincus Elevator* does not address the argument raised by the Hospital in this case. To the extent *Pincus Elevator*

can be read as holding the Board may consider a claim even if no charge has been filed as required by Section 10(b), the case should be overruled. Finally, *Pincus Elevator* is factually distinguishable. In that case, the respondent employer was the first party to present evidence about employee interviews and did not object when the General Counsel questioned employees about whether they had been granted *Johnnie's Poultry's* assurances. In light of these facts, the Board held the respondent employer was not prejudiced by the amendment. In contrast, here, the General Counsel, not the Hospital, was the first party to elicit testimony about employee interviews, and the Hospital objected to the General Counsel's questioning about the *Johnnie's Poultry's* assurances as being beyond the scope of direct. The ALJ erred by denying that objection. The Hospital was prejudiced by having to respond to a claim of which it had no notice and which it did not introduce. Even under the holding of *Pincus Elevator,* the ALJ erred by allowing the amendment.

M. There is No Basis in the Record for the Extraordinary Remedy Ordered by the ALJ (Exception Nos. 16 and 17)

Because there is no violation of the Act, there should be no ordered Remedy. And even if the ALJ's finding of a violation had a basis in fact and law, which it does not, the extraordinary and punitive remedy imposed by the ALJ is punitive and contrary to Board precedent.

As a remedy for the bad-faith bargaining he found, the ALJ ordered the Hospital to bargain for a minimum of 15 hours per week and submit written bargaining progress reports every 15 days. (JD at 46 at 29-30; 47 at 13-14.) However, the Board's standard remedy to address a finding of bad-faith bargaining in violation of Section 8(a)(5) is to order the employer to "on request, bargain with the Union as the exclusive representative of the employees … concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement." *See, e,g., Professional Eye Care*, 289 NLRB 1376, 1378

(1988). The Board will not resort to the extraordinary remedy of ordering a bargaining schedule unless the employer's "behavior was so egregious [or] its defenses so frivolous, that the usual remedies … are inadequate or will fail to remedy entirely the unfair labor practices found." *The Leavenworth Times*, 234 NLRB 649 n. 2 (1978). Here, the record is devoid of evidence supporting any remedy – much less the ALJ's extraordinary remedy.

The ALJ's stated reason for requiring the Hospital to bargain a minimum of 15 hours per week and submit written bargaining progress reports is that the Hospital's counsel allegedly refused to meet more than twice per month.[29] (JD at 13:10-13; 44:43-45.) The factual premise is faulty. In support for his claim that the Hospital would only meet two times per month, the ALJ cited to the bargaining notes for February 23, 2017. (JD at 13:10-13.) However, the discussion relied upon by the ALJ had started much earlier. The Hospital had agreed to pay for the Union's bargaining unit committee members' time at negotiations through December 2016. (R. Ex. 3 at 0095.) When that agreement expired, the Union insisted that instead of full day negotiations, the Parties meet from 1600 until 1930. (*Id.* at 0095-0096.) Bernstein expressed concern that it was not enough time, and suggested the Parties bargain for at least six hours, so if evenings were the only option, until 2200, which Godoff said "was not going to happen." (*Id.* at 0096.) The Parties then met in the evenings, per the Union's request, on January 17 and 31 and February 1, 22, and 23, 2017. (R. Ex. 3 at 0098, 0113, 0127, 0135, 0149.) On February 1, the Hospital asked the Union for additional bargaining dates, the Union did not offer any, but the Hospital proposed four days in March without restriction – 20, 21, 28 and 29. (R. Ex. 3 at 0133.) On February 23, Godoff acknowledged the need to have full day sessions. (*Id.* at 149.) Bernstein reminded the Union "You have always been welcome to propose dates," and in the passage relied upon by the

[29] Out of the gate, this ignores the fact that just prior to the withdrawal, the Parties had bargained October 10 and 11, 2018 and were scheduled to return October 31. (R. Ex. 3 at 0369, 0412.)

ALJ to impose his extraordinary remedy, the notetaker wrote that Bernstein said: "Not imposing hours. Willing to make 2 full days a month," and four lines later, in a passage ignored by the ALJ, invited the Union to "propose more days." (*Id.* at 0149-0150.) While the ALJ should not be entitled to rely solely on bargaining notes to impose such an extraordinary remedy – he certainly should not be allowed to rely on bargaining notes that have more than one reasonable interpretation. Here, Bernstein could have just as easily been emphasizing the "full day" offer, versus limiting his availability, especially when he immediately thereafter invited the Union to propose more dates, and he had offered four separate days for the prior month of March. With respect to March 28 and 29, Bernstein reminded the Union the Hospital was willing to start "as early as your willing to do," and accepted April 5 and 6 – two more days the very next week – during which he offered to start at 0700 – with Godoff responding he was "not going to start at 8." (*Id.* at 0151, 0152.) On April 5, 2017, the Union asked the Hospital for dates in June, and Bernstein proposed three days – June 2, 12 and 13 – and confirmed the Hospital was prepared to meet on all three of them (the Parties ended up meeting June 12-13). (*Id.* at 0190.) On May 16, Bernstein again confirmed the Hospital "was not married" to a two-day-a-month schedule." (*Id.* at 0230.)

In contrast, the bargaining notes, so critical to the ALJ's finding and order against the Hospital, also reveal that the Union refused to meet on Fridays – any Friday, for any amount of time – announcing this restriction in January 2017, after only four bargaining sessions. (R. Ex. 3 at 0109-0110 (Turner stating "We never can meet on Fridays."), 0109-1110 (Turner confirming the Union "can't do any Fridays").) As such, the Union, not the Hospital, severely restricted its availability, providing only four days of every week in which it would even consider bargaining.

Notably, even if the Hospital had limited its availability to two days a month (which it

did not), the Board has long held that even a schedule consisting of approximately one meeting per month connotes good faith. *See, e.g., Boaz Carpet,* 280 NLRB 40, 43 (1986) (13 occasions over 12 months good-faith); *St. George Warehouse, Inc.*, 349 NLRB 870 (2007) (eight times between September 2002 and April 2003 good-faith). Conversely, the threshold for bad faith requires a far more egregious evidentiary showing. *See, e.g., Caribe Staple Co.*, 313 NLRB 877, 878 (1994) (four trips and less than twenty-four hours over two-year period insufficient); *Fruehauf Trailer Services Inc.,* 335 NLRB at 393 (once during seven-month period insufficent).

Further, the Board has not required such an extraordinary remedy in other cases where it found the employer failed to bargain with sufficient frequency. For example, in *Calex Corp.,* 322 NLRB 977 (1977), the Board found a Section 8(a)(5) violation when the employer's negotiator refused to meet more frequently than once per month. Even though the Board found the employer engaged in a "pattern of purposeful delay … employed here to thwart the bargaining process," its remedial order did not require a particular bargaining schedule or the submission of progress reports. *Id.* at 978. Instead, the Board relied on its standard remedial order to address the violation. *Id.* at 980.

In contrast, in those cases where the Board has ordered a minimum frequency of bargaining as a remedy, the employer's conduct was egregious. For example, in *All Seasons Climate Control, Inc.,* 357 NLRB 718 (2011) – the only case relied upon by the ALJ – the Board found a minimum frequency bargaining order was appropriate where the employer had already been subject to a Circuit Court of Appeals order against it enforcing a bargaining order and the employer had "engaged in a deliberate and planned scheme to get rid of the Union" by initiating and sponsoring a withdrawal petition. *Id.* at 734. Similarly, in *Gimrock Construction, Inc.,* 356 NLRB 529 (2011), the Board approved a minimum frequency bargaining order where, after a

standard bargaining order had been enforced by a Circuit Court of Appeals, the employer failed to respond to numerous requests to meet and bargain. As is clear, this case simply does not involve egregious employer conduct warranting the extraordinary remedies of requiring minimum frequency bargaining and submitting written bargaining progress reports.

In another recent case where the Board issued a minimum frequency bargaining order, it required "bargaining sessions should be held for a minimum of 24 hours per month, for at least 6 hours per bargaining session." *Professional Transportation, Inc.,* 362 NLRB 534, 536 (2015). There the Board noted, "this proposed schedule … will promote regular meaningful bargaining between the parties …." *Id.* Here, the ALJ failed to explain why it was necessary to require weekly bargaining and why the Hospital needed to bargain for over 60 hours per month, when in *Professional Transportation*, the Board concluded a requirement of less than 40% of the number of hours of bargaining would promote "regular meaningful bargaining." The only explanation provided by the ALJ is that he believed the Hospital's counsel refused to meet more than twice per month, which as addressed above, is wrong. In the absence of any further explanation from the ALJ for his rationale, it appears his order is designed with the intent to punish the Hospital rather than to achieve compliance with the Act, and it should be reversed.

The order to make whole the Union's employee committee member is punitive and unwarranted as well. The Board's "long-established practice" is to rely on bargaining orders to remedy "the vast majority" of bad-faith bargaining in violation of Section 8(a)(5). *Frontier Hotel & Casino*, 318 N.L.R.B. 857, 859 (1995). "In most circumstances, such orders, accompanied by the usual cease-and-desist order and the posting of a notice, will suffice to induce a respondent to fulfill its statutory obligations." *Id*. While the Board has the remedial authority in an 8(a)(5) case to order the respondent to reimburse the employee negotiators their negotiations costs, it will not

resort to such an extraordinary remedy unless the employer's behavior was egregious. *Id*. Such a remedy is appropriate in "cases of unusually aggravated misconduct" where "a respondent's substantial unfair labor practices have infected the core of a bargaining process to such an extent that their effects cannot be eliminated by the application of traditional remedies." *Id.*

Here, the ALJ solely relies upon *Frontier Hotel & Casino* to support its remedy. In *Frontier Hotel*, the respondent's attorney took a "pugnacious and obstructive stance" and would not engage in discussion of any of the unions' proposals, instead only discussing the respondent's proposals which he declared would not be modified, ultimately declaring impasse and implementing his proposals. *Id*. at 857-858. He goaded the unions to strike and promised that the respondent would merely replace the striking employees. *Id*. at 858. In *Fallbrook Hosp. Corp.*, 2013 NLRB LEXIS 349 (NLRB May 16, 2013), the ALJ acknowledged *Frontier Hotel's* standard for awarding negotiation costs as a remedy, but declined to make such an award despite finding a Section 8(a)(5) violation insofar as the Respondent refused to provide relevant information in response to the union's requests, refused to bargain over the terminations of two employees, and "steadfastly refus[ed] to submit any proposals or counter-proposals." *Id.* at *26, 28, *60-61.

Not only are the factors discussed in *Frontier Hotel* not present in the instant cases, but the factors discussed in *Fallbrook*, where the court declined to award negotiations costs, are not even present.

This case does not warrant any bargaining order, and it most certainly does not involve egregious employer conduct warranting the extraordinary (and punitive) remedy ordered by the ALJ. Accordingly, the ALJ erred by ordering the extraordinary bargaining order, including the "minimum frequency" and negotiation costs components.

IV. CONCLUSION

For all of the foregoing reasons, Respondents District Hospital Partners, L.P., d/b/a George Washington University Hospital and UHS of D.C. Inc. respectfully submit that the ALJ's findings should be reversed in their entirety.

Submitted this 16th day of October, 2019:

Submitted by:

By: /s/ *Tammie Rattray*
FORDHARRISON LLP
Tammie L. Rattray
Florida Bar No.: 0128619
trattray@fordharrison.com
101 E. Kennedy Blvd., Suite 900
Tampa, FL 33602
T: (813) 261-7800 | F: (813) 261-7899

Paul R. Beshears
Georgia Bar No.: 055742
pbeshears@fordharrison.com
271 17th St. N.W., Suite 1900
Atlanta, GA 30363
T: (404) 888-3800 | F: (404) 888-386

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing was filed electronically with the National Labor Relations Board at www.nlrb.gov, and duly served electronically upon the following named individuals on this 16th day of October, 2019:

Michael A. Rosas Michael.rosas@nlrb.gov Administrative Law Judge National Labor Relations Board 1015 Half Street, S.E. Washington, D.C. 20570	Stephen W. Godoff, Esq. sgodoff@abato.com Abato, Rubenstein & Abato, P.A 809 Gleneagles Court, Suite 320 Baltimore, MD 21286-2230
Barbara Duvall Barbara.duvall@nlrb.gov Andrew Andela Andrew.Andela@nlrb.gov Counsel for the General Counsel NLRB, Region 5 100 S. Charles St., Tower II, Suite 600 Baltimore, MD 21201	Steven Bernstein Sbernstein@fisherphillips.com Michael Bohling mbohling@fisherphillips.com Reyburn Lominack III rlominack@fisherphillips.com Fisher & Phillips, LLP 101 E. Kennedy Blvd., Suite 2350 Tampa, FL 33602

FORD & HARRISON LLP

By: /s/ *Tammie L. Rattray*
Attorney

WSACTIVELLP:10882648.1